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Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIK HEINE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 15,952
JURI RAUS,	)	
Defendant.	)	

ORDER

Upon the oral motion of defendant's counsel made during the course of oral hearing on March 11, 1966 and on the basis of the written motion filed March 22, 1966 to amend his answer so as to raise the defense of absolute privilege, it is by the Court this _____ day of March, 1966,

ORDERED that the motion for leave to amend be and the same is hereby granted and that the defendant may amend his answer in the manner and form set forth in his written motion so to do.

Chief Judge Rozel C. Thomsen

CERTIFICATE OF SERVICE

A copy of the foregoing proposed ORDER was mailed, postage prepaid, this 21st day of March, 1966, to Ernest C. Raskauskas, Esquire, 1418 Ray Road, Hyattsville, Maryland, and Robert J. Stanford, Esquire, 10401 Grosvenor Place, Rockville, Maryland, Attorneys for Plaintiff.

/s/ PAUL R. CONNOLLY

Paul R. Connolly
5411 Albemarle Street
Westmoreland Hills
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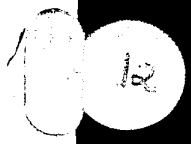
Attorney for Defendant



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 15,952
JURI RAUS,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO AMEND ANSWER

Rule 15a provides that leave to amend shall be "freely given when justice so requires."

For reasons clearly beyond the control of the defendant, as detailed in the testimony of E. Barrett Prettyman, Jr., Esquire, given in this Court before Honorable Rozel C. Thomsen on March 11, 1966, the defendant was earlier precluded from raising this defense which, based upon the affidavit of Richard Helms, Deputy Director of the Central Intelligence Agency, is clearly not frivolous or interposed for delay.

At the hearing before Chief Judge Thomsen on March 11, 1966, the defendant's counsel clearly understood that leave to amend would be granted.

/s/ PAUL R. CONNOLLY

Paul R. Connolly
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Washington 16, D. C. OL 2-5851

/s/

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland OL 6-7289

Attorneys for Defendant

Of Counsel:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

CERTIFICATE OF SERVICE

Copies of the foregoing MOTION TO AMEND ANSWER and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND ANSWER were mailed, postage prepaid, this 21st day of March, 1966, to Ernest C. Raskauskas, Esquire, 1418 Ray Road, Hyattsville, Maryland, and Robert J. Stanford, Esquire, 10401 Grosvenor Place, Rockville, Maryland, Attorneys for Plaintiff.

/s/ PAUL R. CONNOLLY

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 15,952
JURI RAUS,	)	
Defendant.	)	

MOTION TO AMEND ANSWER

Comes now the defendant, by his attorneys, and moves the Court, pursuant to Rule 15 of the Federal Rules of Civil Procedure, for leave to amend his answer so as to add a ninth defense in the manner and form as follows:

> On those occasions specified in paragraphs 5, 6 and 7 of the complaint, the defendant was in possession of information furnished to him by the Central Intelligence Agency, and when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States. Accordingly, the statements made by him on such occasions were absolutely privileged.

As reason for this motion to amend, the defendant says that he was prevented from raising this defense in his original answer by reason of the nature of his employment and instructions to his counsel as detailed

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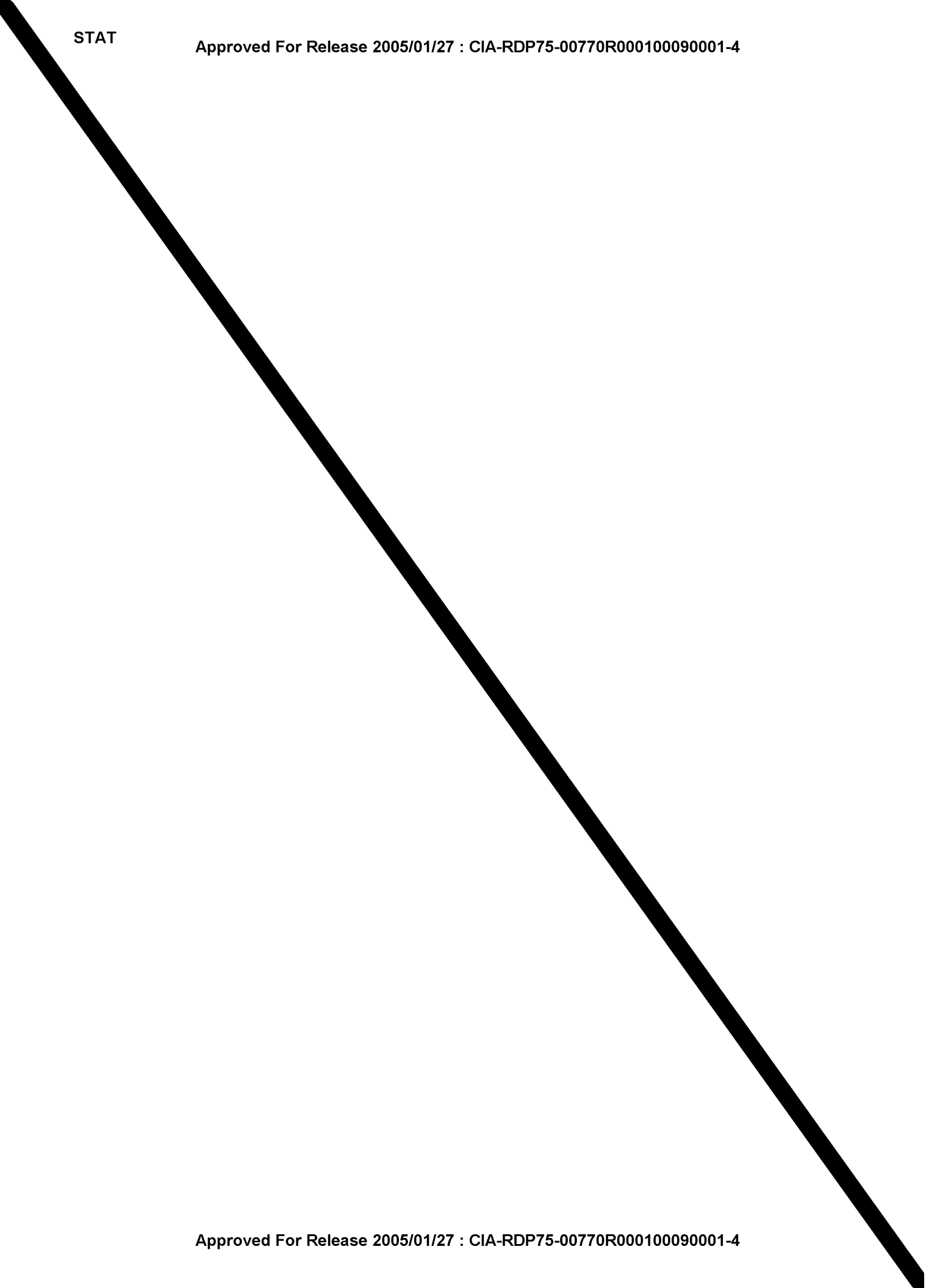

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE

vs.

JURI RAUS

Civil No. 15952

Friday, March 11, 1966

TRANSCRIPT OF PROCEEDINGS

FRANCIS T. OWENS
Official Reporter
514 Post Office Building
BALTIMORE 2, MARYLAND
SAratoga 7-7126

in the oral testimony of E. Barrett Prettyman, Jr., Esquire, given at the adjourned hearing upon defendant's motion for summary judgment held on March 11, 1966.

/s/ PAUL R. CONNOLLY

Paul R. Connolly
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Westmoreland Hills
Washington 16, D. C. OL 2-5851

/s/

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland OL 6-7289

Attorneys for Defendant

Of Counsel:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

I N D E X

Witness	Direct	Cross
E. Barrett Prettyman, Jr.	68	73

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

- - -

BERIK HEINE :
:
vs. : Civil No. 15952
:
JURI RAUS :

Baltimore, Maryland
Friday, March 11, 1966

The above-entitled matter came on for hearing before His Honor, Roszel C. Thomsen, Chief Judge.

APPEARANCES

For the Plaintiff:

Mr. Ernest C. RASKAUSKAS
MR. ROBERT J. STANFORD

For the Defendant:

MR. PAUL R. CONNOLLY
MR. L. BARRETT PRETTYMAN, JR.

- - -

PROCEEDINGS

MR. CONNOLLY: Now, I believe Your Honor is familiar with the file.

As Your Honor knows, this is an action for damages for defamation, the defamation being three alleged slanders. They are set forth in Paragraph 5 of the complaint, in which it is said that the defendant Juri Raus spoke at a special meeting of the Board of the Legion of Estonian Liberation in New York City, and it was said by the plaintiff that he is a communist, that he is a KGB agent, and I think the gentlemen at the opposite table and myself would agree that the KGB is a new designation by the communists for the Soviet Secret Service, which used to be known as the NKVD.

In effect I agree with what was said that this statement indeed charges the plaintiff with being a Soviet secret agent.

In Paragraph 6 it is said that on July 4, 1964 in Pasadena, Maryland, the defendant repeated these statements to a man by the name of August Kuklane, and that on September 4th, Paragraph 7, the same thought was repeated again, a rather frequent incident, in the City of Baltimore.

The defendant filed an answer in which he

admits that he spoke those words, or the substance of those words, and he also admits that at the time he spoke he was in possession of responsible information received by him from an official agency of the United States Government.

THE COURT: Where is that? That is at the top of page 2, is it?

MR. CONNOLLY: That is correct, Your Honor.

THE COURT: That he said he was in possession of it?

MR. CONNOLLY: That is right.

THE COURT: And then he alleges in the chird defense that the evidence is that he had the information from the official agency of the government were true.

MR. CONNOLLY: That is right.

THE COURT: That is what he alleges in the third defense.

MR. CONNOLLY: And the fourth defense that they were made on a privileged occasion, and the fifth defense that the plaintiff's action is contrary to the interest and public policy of the United States.

The seventh defense, that he was privileged as the plaintiff said he did in that he was acting as an appropriate officer of the Estonian liberation movement.

We find also he is not a citizen of the United States. That of course appears in the complaint itself.

Now, I think I have to say, as Your Honor observed in the colloquy we had off the record at the recess, to refresh Your Honor's recollection, that one must approach this case with a wonder and perhaps with an attitude. If indeed the plaintiff is an innocent law-abiding citizen, a dedicated fighter for his homeland, if he is a person who has all his life opposed the Soviet communist conquest of his homeland and has fought Soviet principles and something has been said of him to damage his reputation, it is indeed a monstrous thing that has happened to him.

On the other hand, if this man posing as a freedom fighter, posing as an Estonian partisan against Soviet rule in his homeland, if he has in fact been a Soviet agent, then what has happened to him is no more than any American I think would believe was his just desserts.

The difficulty in approaching such a case is that at the outset we do not know which is true, and if we could try the issue of whether it is true or not, perhaps that particular issue would be satisfied; but the law and the Supreme Court itself has established a clear-cut principle that prevents inquiry, in two cases Barr vs. Matteo, 360 U.S. 564; and Howard vs. Lyons, 360 U.S. 593, both decided on the same day in 1959.

The Supreme Court held that the doctrine of

absolute privilege, which everyone had earlier conceded applied to judicial and legislative proceedings, and had applied to at least senior officers in the executive branch of the service, applied also to lesser government employees, as long as they were acting in, within what the Supreme Court felt were the outer perimeter of their duty.

Now, in deciding those cases the Supreme Court alluded and quoted with respect the opinion of Judge Learned Hand in Gregoire vs. Biddle, 177 F. 2d 579, a case in 1949, in which he states:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or

the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded upon a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitably in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

THE COURT: Well, I do not have any doubt at all about that proposition.

MR. CONNOLLY: And so one may approach this case with this kind of assumption, that indeed there may have been a man whose name was Derik Heine who had portrayed himself as being an anti-Soviet, who had been a partisan fighter for freedom in his homeland, who portrayed himself as being that, he came to Canada, and then came in on various

encouragements into the United States to meet with Estonian emigres in this country, who attempted to raise money for what he describes as Estonian freedom movement activities, but who was interested in finding out who those persons in the Estonian emigration movement were who were interested in promoting such activities.

THE COURT: All right. I understand that background here. He may be what he claims to be or he may be what you say he is.

MR. CONNOLLY: That is correct.

THE COURT: If that is the question, that is an open question. But the question is how to raise, and whether you have properly raised this defense of absolute privilege. That is the first question, it seems to me.

MR. CONNOLLY: Now, we have filed an affidavit of the Director, Deputy Director of Central Intelligence, which recites that on those occasions recited in Paragraphs 5, 6, and 7 of the complaint the defendant was in possession of information furnished him by the Central Intelligence Agency, and when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the agency on behalf of the United States.

Now, that affidavit stands uncontradicted in the record, and I do not see how it can be contradicted

because obviously the only people who have knowledge of it would be the Central Intelligence Agency.

THE COURT: Well, the first point, or several points that I made there when you were up at the bench that I wanted to hear about, how is this point of privilege raised? Is it raised by--it is not raised by any pleading in the case. It is not raised by any answer in the case; it is raised only by this affidavit.

Is the affidavit filed on behalf of the government raising the point, or is the point being raised by the defendant.

I have not read these Barr vs. Matteo and these other cases. Who raised the privilege?

MR. CONNOLLY: The employee.

THE COURT: Who?

MR. CONNOLLY: The employee.

THE COURT: He claimed it?

MR. CONNOLLY: He claimed absolute privilege.

THE COURT: He claimed absolute privilege?

MR. CONNOLLY: Yes, sir. It is perfectly clear that the employee himself claimed it, and perhaps it is well to allude to the fact of Barr vs. Matteo and Howard vs. Lyons.

THE COURT: Well, obviously it is not

disputed that the employee can raise it, and that it does not have to be raised by the government. Then the question is, has it been properly raised in this case.

MR. CONNOLLY: Well, shall we get an answer to the first question as to whether they concede that the employee can raise it?

THE COURT: I gather that the plaintiff--

MR. STANFORD: Your Honor, we believe that the employee can present facts to the Court upon which he can enter a plea of immunity, and that he can show that he was within the scope of his employment, that it is not solely the government's role to waive it, to allege it.

THE COURT: Well, what you are saying in effect is that the defendant can raise it.

MR. STANFORD: Yes.

THE COURT: But you say he has not raised it?

MR. STANFORD: He has not raised it for a number of different reasons.

THE COURT: That is right, and with that concession, I think that you can go to show that you have raised it properly.

MR. CONNOLLY: I think that enough of a plea of privilege has been raised in this case when the answer was filed so that the plaintiff was put on general notice

of the fact that there was privilege, and that there indeed was an involvement with a governmental agency.

THE COURT: He said he had gotten the information from a government agency? Isn't that what you pleaded? You did not plead this privilege?

MR. CONNOLLY: Did not?

THE COURT: You said, your language was cryptic, and it may be that was all he was legally entitled to do at that time, and maybe he has since been released; but should not both facts be brought before the Court to explain why it was so cryptic?

MR. CONNOLLY: Well, I do not know that he can do that, Your Honor. The fact of the matter is that when the suit was first brought we were not permitted to admit that he was at the time acting upon orders of the Central Intelligence Agency.

THE COURT: But you went further. You affirmatively stated he was employed in another department.

MR. CONNOLLY: No, Your Honor, we do not. We said in no place that.

THE COURT: Not in the pleading but did not you say it in your--in one of these earlier motions?

MR. CONNOLLY: No, sir.

What you have reference to is an affidavit that was filed in response to the plaintiff's request for

discovery, that the deposition of the plaintiff be taken on written interrogatories or in the alternative that the deposition be taken in Toronto, the home city of the plaintiff.

THE COURT: Well, he says, "I am employed as a GS-12 in the Bureau of Public Roads in the Department of Commerce in Washington, D. C., at an annual gross salary of $10,605."

MR. CONNOLLY: Yes. And that was subscribed and sworn to the 15th day of January 1965.

THE COURT: All right.

MR. CONNOLLY: There is no inconsistency between that and Mr. Helms' affidavit, which says that on the occasions referred to in Paragraphs 5, 6, and 7 of the complaint that he was acting in the scope and course of his employment for Central Intelligence Agency.

Furthermore, I suggest to Your Honor, that there is no inconsistency because a man can discharge duties for more than one employer and discharge more than one task at a contemporaneous period of time.

THE COURT: Well, are you going to or you say that your man is still legally not allowed to say that he was an employee of the--

MR. CONNOLLY: Central Intelligence Agency.

THE COURT: Central Intelligence Agency, that

he is still not entitled to say that?

MR. CONNOLLY: I have advised him on the basis of Mr. Helms' affidavit, and if Your Honor cares to hear from him, he is sitting here in the courtroom, I have advised him that he can go and say that much; but he cannot go further.

THE COURT: Well, if he can say, he can himself then say that he was an employee.

MR. CONNOLLY: Yes. I can call him to the witness stand and put him under oath and have him say it.

THE COURT: Well, if you do he will be subject to cross-examination, and you had better find out how far--

MR. CONNOLLY: Well, he would claim--

THE COURT: --it can go.

MR. CONNOLLY: Well, he would claim the privilege as to any other questions other than that.

Now, Your Honor seems to think that there is a certain degree of unfairness at least.

THE COURT: No, I am not thinking in terms of unfairness. Of course, the government has a duty to protect itself, of course, and if that is the rule, the point is that it has to be established in a way that the Court can accept it.

A man could come in and make such an affidavit,

and he could get a friend of his to make an affidavit saying, "I am the deputy head or some employee of some agency, and this fact is true."

There are ways of setting up these facts that are, sure, and the government has certain ways of certifying that this man says he is the head of the Central Intelligence Agency or the Deputy Director, or whatever it is, of the Central Intelligence Agency, and you told me at the bench before that if I read the newspapers I would know he has been confirmed by the Senate.

MR. CONNOLLY: Not the newspapers. No, not the newspapers, no, Your Honor, I can say that.

THE COURT: All right.

That in the Congressional Journals I would find it out, but I cannot remember everything in the Congressional Journals.

MR. CONNOLLY: No, sir, but I say that Your Honor can take judicial notice of the fact that Richard Helms is the Deputy Director of the Central Intelligence Agency because he is an officer appointed by the President with the advice and consent of the Senate.

THE COURT: All right.

MR. CONNOLLY: --of the United States. So, he is not just a governmental employee who can be employed, but it takes a public act of Congress to give him his job.

THE COURT: No, no, that is all right, but it is customary in filing this type of affidavit, is it not, to have some sort of a certification, although if the plaintiffs will admit that this man is the Deputy Director that will avoid that problem.

Is there any dispute about that? Do you dispute that Mr. Helms is the Deputy Director?

MR. CONNOLLY: Of the Central Intelligence.

THE COURT: Of the Central Intelligence.

MR. STANFORD: Your Honor, we would be delighted to enter into discovery to find out whether he did make this. I believe there is a Mr. Richard Helms who is Deputy Director of CIA; but we cannot say anything further then that.

THE COURT: You want to bring him in and ask him and look at him and let him say, "I am"?

MR. STANFORD: Your Honor, what our point is is this: Our major contention in that area, and I do not wish to get off on a tangent; but our major contention with regard to that area is that if he wants substantiation of the conclusions which he arrives at in his affidavit as to the facts.

THE COURT: It is a question of whether you are entitled to substantiation or not. That is the real question that is before me now, isn't it?

MR. STANFORD: That is right.

THE COURT: Whether you are entitled to such substantiation.

MR. STANFORD: Yes, sir.

THE COURT: And I understand that. The fact that he is this agent can be cured by some sort of a certificate by some underling in the department putting a slot of red ribbon and somebody's blue sticker and an eagle on it, and then we have it and it is clearly admissible to prove that fact.

Now, if you do not dispute it or if you do dispute that he holds that position or that it is not his affidavit, if you seriously dispute that I do not want to ask you to admit it.

If what you are really saying is that you do not dispute that that he is the man but you dispute the sufficiency of his affidavit, you can say that.

MR. STANFORD: Your Honor, I think ordinarily it would be captious and contentious on our part to argue that particular point. However, in this particular case we have been foreclosed from any discovery whatsoever; so I feel that since we are entitled to some discovery on that line that we can really neither admit nor deny.

We are not saying that Mr. Connolly and Mr. Prettyman are putting in a false affidavit, nothing of that

sort.

THE COURT: All right.

MR. STANFORD: But at the same time, sir, we just do not know enough about it in order to either admit nor deny the statement.

THE COURT: So that you require them to stand on the sufficiency of their affidavit in every respect?

MR. STANFORD: Yes, sir.

THE COURT: All right.

MR. STANFORD: Of course there is an affidavit that is in form and style which is appended to our motion is similar to theirs filed by August Kuklane, which they submitted in response or in answer, an affidavit signed before a notary public, which is sufficient.

THE COURT: Well, there is no question, and I was trying to simplify some things, but my difficulty is that if the individual can raise the point he has to prove it, and if you are relying on just one government official saying a fact which knocks the plaintiff out, a dishonest government official could knock out a lot of law suits, and I am trying to see how you protect somebody in a situation like that.

MR. CONNOLLY: Well, number one, Barr vs. Matteo and Howard vs. Lyons clearly state that the individual

himself may raise it.

THE COURT: All right.

MR. CONNOLLY: Number two, we have raised it by means of an affidavit.

Now, if it is not pleaded in haec verba, then we would ask leave to amend to add a new defense to the answer to put in haec verba the claim of absolute privilege.

THE COURT: Well, I do not think you have pled the privilege. I think the fourth defense is very cryptic:

> "That the defendant made statements concerning the plaintiff only upon privileged occasions to persons privileged to receive them, and each such statement was made without express or actual malice in furtherance of defendant's legitimate duty, responsibilities and offices."

When you couple that with his statement that he has made elsewhere, as I recall the briefs that I have read, that he has said elsewhere that he made these statements as a representative of some voluntary organization, and he also said elsewhere that he was an employee of another branch of the government, if he is raising the point, I think he ought to do two things.

I think if this is not the government raising the point, if it is not the government coming in and saying,

"We claim the privilege," there I think when a man has said one thing one time and another thing another time on two essential points in the case, that the Court has a great difficulty in allowing summary judgment, and that it may well be is to do the sensible thing which was suggested at the bench and to have a separate trial on this issue, which I understand the plaintiff says he is willing to do before the Court without a jury in which then certain matters can be proved, certain matters can be proved by information you would ask to be sealed, except as it perhaps would be made available to attorneys for the plaintiff on the ground or upon their promise that they would not disclose it, and certain other matters, you could or the government can claim privilege on, and certain other matters you can say that you are legally not allowed to answer, and then the Court after hearing all of the evidence can decide it, and as a part of that I think the Court would have to determine whether or not the plaintiff was entitled to some further preliminary interrogatories or whether the matter should be handled by bringing the witnesses over and taking the testimony in open court, or if it is a situation that it is a matter of the safety of the United States, perhaps counsel for both sides could agree that it can be taken in camera. This is not a criminal case.

And cases can be heard in camera if necessary.

MR. CONNOLLY: What I am apparently having difficulty with is your conviction apparently, is that the defendant said different things on different occasions about the same thing, and that is not so.

He said in an affidavit that he was an employee of the Bureau of Public Roads.

THE COURT: On a certain date.

MR. CONNOLLY: That is correct. He is still an employee of the Bureau of Public Roads.

THE COURT: Was he an employee of the Bureau of Public Roads when he made these statements?

MR. CONNOLLY: If it makes any difference, yes.

THE COURT: All right.

Well, then, he has not said himself, he has never said himself that he was an employee of the Central Intelligence Agency.

MR. CONNOLLY: He does not have to.

THE COURT: You mean you can just do it by-- he has not said it. He has not done that.

MR. CONNOLLY: That is what I am doing, and Your Honor, in order to specifically raise this, if Your Honor has a question, as apparently you do, about the form

of the answer I move to amend the answer to assert absolute privilege.

THE COURT: Well, that is one of the points that is discussed in the brief.

MR. CONNOLLY: Now, as to whether he was acting on behalf of the Central Intelligence Agency, as Mr. Helms' affidavit says, and whether he was acting on behalf of the Legion of Estonian Liberation, when he spoke, as he said in his own affidavit, there is nothing inconsistent about that.

THE COURT: Well, I am not saying that there is anything inconsistent. I am saying that they are two different things. They are not necessarily inconsistent.

MR. CONNOLLY: And indeed it is not a material fact in dispute because you establish the agency of a man by proof from his employer, and we have done that, and the only question in this case is, was he when he spoke an officer or an employee of the United States? If he was there is absolute privilege.

THE COURT: Well, you mean if he was acting within the scope of his duties?

MR. CONNOLLY: Correct.

THE COURT: And a member of the Bureau of Public Roads, let us say, or the elevator operator here has some duties perhaps to disclose to somebody if she

learns something, but it is not within her duties to charge somebody with being a communist.

MR. CONNOLLY: No, but Mr. Raus has never said that he spoke of Mr. Heine when he was acting as an employee of the Bureau of Public Roads.

THE COURT: No.

MR. CONNOLLY: So that there is no inconsistency with respect to the Helms' affidavit.

Mr. Helms has said that when he did speak he was acting on behalf of the United States.

So Raus has said that at that time he was acting on behalf of the Legion of Estonian Liberation, of which he is the National Commander, which is established in the record; and there is no inconsistency there.

THE COURT: Well, now, let's see this. The point that the defendant is making or the point that the plaintiff is making is that the affidavit of Mr. Helms contains several facts, and he questions the conclusory facts, and he says that the affidavit being conclusory is not fully binding upon him.

He says, Mr. Helms says that:

"He has familiarized himself with the allegations of the complaint."

That means he has read the complaint.

That he has familiarized himself with the

Central Intelligence Agency's participation in communicating information concerning Eerik Heine to representatives of the Estonian emigration movement in the United States, and he does not have to have personal knowledge of all of that, and as Director he can see what has been done.

Then he says:

"On those occasions specified in Paragraphs 5, 6, and 7 of the complaint, the defendant Juri Raus was in possession of information furnished to him by the Central Intelligence Agency."

Now, that is an allegation of the fact. I think the government is entitled to protect the name of the men who told Raus that.

I think the plaintiff is entitled to be sure that Raus got it or did in fact get it from a member or from someone connected with the agency.

MR. CONNOLLY: Mr. Helms says so.

THE COURT: Well, I know, but the question is, he has not said that he knows it on personal knowledge, and that is the question because I am not sure that he has to, and I think that is the question that is in issue, and that is, is this a sufficient allegation?

And that question is that when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the agency

on behalf of the United States.

It is a kind of a backhanded statement that he was employed by the agency; but I think that is a sufficiently clear statement that he was employed by the agency, and perhaps he was paid a salary by somebody else, which was perhaps desirable.

I do not think the government is barred from employing somebody in an intelligence capacity and putting him on the payroll of some other agency, and there is no reason why Raus can't say that, I would think.

And that when he spoke on such occasions he was acting within the scope and course of his employment. That is a conclusion, and again I have an open mind on whether that is something on which the Court can give summary judgment, and I think it would be simpler if your man had not made statements that he was acting for somebody else at that time.

MR. CONNOLLY: Well, he did not, Your Honor.

THE COURT: Well, he said he was acting for somebody else. He did not say, "I was not acting for the Central Intelligence Agency."

MR. CONNOLLY: If he said that that would be a contradiction.

THE COURT: Yes, he did not say that.

MR. CONNOLLY: Yes.

THE COURT: That is right.

MR. CONNOLLY: Let's see what the plaintiff wants here.

THE COURT: I am sure he wants a great deal more then the Court is going to give him with four hundred and some interrogatories, some of them running all the way down to (k), and some of them must have a thousand questions.

MR. CONNOLLY: There are four hundred-and-thirty some, I think, with many subsections.

THE COURT: They must add up to a thousand.

MR. CONNOLLY: Well, let's take page 13.

In commenting upon the affidavit he says in his memorandum brief:

"Nothing sets forth with decisiveness or clarity the elements of fact upon which the Court can make a determination of the vital central issue upon which the motion depends. Nothing states the dates of the defendant's employment with Central Intelligence Agency, his position, his supervisor's name and title, the employees under his supervision."

THE COURT: Well, they do not have to give him that. If the plaintiff would limit himself to asking what he is really entitled to it would be more impressive. When you are asking for the moon you often do not get the

necessary ration of green cheese.

MR. CONNOLLY: I want to direct Your Honor's attention to Section 403 (g) Title 50,United States Code Annotated.

THE COURT: What title?

MR. CONNOLLY: Title 50, United States Code, 403 (g):

"In the interest of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of 403 (d) (3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of Section 654 of Title 5," title record keeping, "and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: provided, that in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under Section 947 (b), Title 5."

Now, concerning the conclusory nature of the affidavit in Howard vs. Lyons the only statement that was

made upon which summary judgment was granted was the fact that the defendant was acting on behalf of the United States at the time he made the statement.

In Howard vs. Lyons the defendant was a Commander of the Boston Naval Shipyard, and the plaintiff was a National Commander of the Federal Employees' Veterans Association. That is 593, 594, 595, where I am now, 595.

The defendant made a statement, a public statement defamatory of the plaintiff and sent copies of it to the Massachusetts congressional delegation.

He moved for summary judgment, attaching to the motion his own affidavit essentially repeating the statements from his answer above summarized, namely, that it was a part of his official duty, and an affidavit from the Commandant of the First Naval District:

"That affidavit stated that the Commandant was petitioner's commanding officer; that the making of reports to the Bureau of Ships relative to any significant personnel action at the shipyard was one of the petitioner's official duties; that also among those duties was the furnishing of copies of such reports to the Massachusetts congressional delegation; and that the dissemination of the report of September 8, 1955 to the newspapers had been made through official channels and approved

by the acting Commandant of the First Naval District.

"The District Court granted summary judgment for petitioner," and the matter was taken to the Supreme Court and affirmed, and that was all that was required there.

At page 597 the Court held that the standards to be applied had to be federal standards, namely, that in determining whether the person was an employee or not or whether the statement was made on a privileged occasion, federal law and not state law had to be applied and that on the basis of the uncontradicted affidavits "That the sending of copies of the report here at issue to members of the Massachusetts congressional delegation was part of petitioner's official duties," the Court confirmed or affirmed that decision.

THE COURT: Five to four including Mr. Justice Frankfurter and Mr. Justice Whittaker as part of the majority.

MR. CONNOLLY: Are you considering changes? Well, I direct Your Honor's attention to the fact that Mr. Justice Black--

THE COURT: I understand, and Mr. Justice Black concurred.

MR. CONNOLLY: Yes.

THE COURT: This was a five to four decision.

MR. CONNOLLY: No, six to three. Howard vs. Lyons, six to three. Barr vs. Matteo is five to four, and is still the law.

THE COURT: Warren, Douglas, Brennan, and Stewart dissented in the Barr-Matteo.

I have not had a chance to read all these.

MR. CONNOLLY: Now, Your Honor, in pages 3 and 4 of our memorandum brief, since Barr vs. Matteo, its language and its principles have been followed by the Tenth Circuit and the Seventh Circuit.

THE COURT: I will follow it.

MR. CONNOLLY: And the Second Circuit.

THE COURT: I will follow it. You do not have to worry. This Court follows binding decisions of the Supreme Court whether I agree with them or not, and I happen to agree with this one.

MR. CONNOLLY: I thought you were making some comment about the fact that the composition of the Court has changed;so maybe the opinions were not any good.

THE COURT: I am not saying what chances of it being sustained on appeal are,assuming I did follow it.

MR. CONNOLLY: Well, it is still the law.

THE COURT: That is right.

MR. CONNOLLY: And every Circuit has passed on this except the Fourth Circuit, which has not had the

case.

THE COURT: That is right. I will follow it. I follow the decisions of the Supreme Court, as I say, whether I like them or not, and I think that this is a proper one, and you have to protect the government officials; so you can start off with that view that I do.

MR. CONNOLLY: In considering the nature of Section 403 (g), Title 50, I would like to direct Your Honor's attention to a case which is not in our brief, which I have in my hand, which is an old case, very brief, but also very interesting from an historical standpoint, Totten vs. United States.

I have the Lawyers' Edition here, which is that the only one/was in the library. It is 23 Lawyers' Edition at page 605. It is 92 U.S. 105, 1875, opinion by Mr. Justice Field.

The case came to the Supreme Court from the Court of Claims:

"The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate under a contract with President Lincoln, made in July 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and

fortifications, and gain such other information as might be beneficial to the Government of the United States, and report the facts to the President; for which services he was to be paid two hundred dollars a month."

At first the Court of Claims had a question as to the President's authority to enter into such a contract, and the Supreme Court had no difficulty with that; but it did have a problem of whether or not such a suit could be maintained, a suit to recover compensation under a contract to render secret services.

"We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as Commander in Chief of the Armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.

"Our objection is not to the contract but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret

service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

THE COURT: You do not have to argue before me that the secret processes of the government when claimed by the government are entitled to be respected; but I say that the person who has the right to claim it seems to me to be the United States Attorney and not the defendant who is being sued, if you are claiming some sort of privilege.

MR. CONNOLLY: Yes.

THE COURT: Now, I do not have any doubt that you can raise the point. You can file the affidavit. Now, the question is whether this is a case for summary

judgment or not. That is all that is worrying me at this point, and all that is before me at this point is whether it is a case for summary judgment.

MR. CONNOLLY: And the only question involved is whether or not there is proof of the fact, the uncontradicted proof of the fact that Raus at the time he made the allocutions of the plaintiff was an employee of the United States.

There is an affidavit that he was.

THE COURT: That is right.

MR. CONNOLLY: And these gentlemen take the position that that affidavit is not sufficient and they want to test it.

I am saying this to Your Honor and maybe this brings it into proper perspective, I am saying to Your Honor that this is a case of sui generis because they cannot go behind that affidavit.

THE COURT: Well, I am saying maybe they can go behind it, but I am not persuaded, and I have not seen any authority yet, and I will be glad to see it, and this is the heart of it, that says that you have a right to say you cannot go behind it.

If this were an ordinary affidavit in an ordinary case of course they could go behind it. If you have proper interrogatories they could file counteraffidavits.

Now, obviously they are in no position to file a counteraffidavit, and they cannot say, and there is no one I can imagine who could say this man is not telling the truth without some--they can however make some inquiry, and I think they are entitled to make the inquiry in an individual case until the government says, "No."

Now, what has happened in this case, as I understand it, is that your man filed a cryptic point on privilege, and for some reason apparently he did not, or taking it from your point of view he was not allowed to disclose the fact.

The other point is that the facts may not have been quite as clear as he now would like to have them. That is the present suggestion, and maybe it was not so clear that he was.

Now, the government apparently for some reason does not release him even though some of the fat is in the fire, and the fact that he may have some connection is disclosed by his saying, "I got the information from the government," the facts that we had before.

Now, he has made these conflicting--they are not conflicting, and it is not inconsistent, but they are different statements, those different statements that even though they are not inconsistent, would in an ordinary case,

it seems to me, be subject to give this Court great pause before entering a summary judgment.

Now, I would certainly because of the different statements allow in the ordinary case a plaintiff to make some discovery. I would not allow him to ask for 431 questions with one to ten or eleven different parts, and certainly I read only the first page, and I know I am not going to allow him to ask the first page, so I did not think I had to go much beyond the first page to see that I am not going to allow them as a whole and could just see from skimming the other pages that they are unreasonable.

But that does not mean that he can't file another set that is reasonable, and particularly on this one issue dealing with the privilege I would ordinarily allow him to ask those questions at this time and hold up his right to ask the other questions until we got by this privilege section or business.

Now, you say your man cannot answer.

MR. CONNOLLY: If I have the Criminal Code here I think I can find the provision. It says it in here.

THE COURT: Well, all right. But it does not say that the Central Intelligence Agency cannot answer. They have answered, and they have waived their privilege up to a certain point, and if they have waived it up to

this point, if they have waived it by the affidavit, the Government has waived the privilege up to this point I think that the plaintiff is entitled, assume the plaintiff is a communist, assume he is everything you say, everybody has some rights in this country, and he is entitled to press his interrogatories where the privilege has been partly waived up until the Attorney for the government says, "We say this is against the interest of the government and we assert our privilege beyond this point."

Now, at that point it may well be that the Court must say that that is as far as anybody can go, and I have got to decide it on this basis.

But I think I am bound to allow the plaintiff to go that far.

MR. CONNOLLY: No, I take some issue with Your Honor when you say that everybody has got some rights in this country; the plaintiff here--

THE COURT: Well, the Court found that Provo bad, and I do not think this man is any different.

MR. CONNOLLY: This man is an alien.

THE COURT: --would be any worse than Provo.

MR. CONNOLLY: This man is an alien.

THE COURT: All right. All people in the United States, just as Mr. Justice Frankfurter said, "There are some things you cannot do to a dog," and I quoted that

in the Provo case, and I think it applies in this case, and we will take lunch for a half-hour or an hour, and come back for the rest, but you are not going to persuade this Court that there is anybody in this country who does not have some rights.

(Thereupon, there was a recess taken from 1:30 o'clock p.m. to 2:30 o'clock p.m.)

AFTERNOON SESSION

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(The Court reconvened at 2:30 o'clock p.m.)

THE COURT: All right.

MR. CONNOLLY: Judge, there is one other case I wanted to call your attention to, which is not in my brief, Norton vs. McShane, and it is a Fifth Circuit opinion, very recent vintage, 1964, 332 F. 2d 855.

I would like to direct Your Honor's attention to the affidavit of Attorney General Robert F. Kennedy which is set forth in a brief paragraph at the top of page 855, and I would just like to submit that to Your Honor, and the affidavit was held sufficient in that case.

THE COURT: Well, that is the Oxford case?

MR. CONNOLLY: Yes. Certiorari was denied in that case.

Now, over the lunchroom recess I have had a chance to reflect a bit, and it seems we are here, and we have an affidavit which says that Juri Raus at the time he spoke was acting on behalf of the United States as an employee of the United States.

Now, very nicely Mr. Raskauskas and Mr. Stanford detailed their arguments in opposition, and that affidavit is not challenged.

THE COURT: How can they challenge it without getting some further discovery?

MR. CONNOLLY: Well, this is my point. I do not understand them to deny that Raus was an employee of the United States. I do not even think they want to do that, and I suggest to Your Honor that it would be rather preposterous for Mr. Helms, who is an officer not without significance in the federal government, to have filed such an affidavit if it were not true.

But they have not sought to challenge the accuracy that he was at the time an employee of the United States. As I read their opposition and as I reflect upon it, what they say is that they do not think it was within Raus' scope of duties to have libeled or to have defamed or slandered the plaintiff, and they say that in Item 4 that the CIA is not privileged to do that because they have no jurisdiction over the internal security affairs in the United States.

Now, the rest of their arguments are really procedural in character; but the only one of substance, the only one that they complain about, the only one that they can raise under Barr vs. Matteo and the other one, the other cases decided thereunder, is whether the employee was acting within the course of his duties, either his duties or the duties of the agency.

Now, that is the matter about which they raise a dispute; but clearly the statutory plan itself shows

that the CIA is not limited to merely handling--

THE COURT: You answered that in your reply brief.

MR. CONNOLLY: There is no reply brief.

THE COURT: Well, are you going to give me something as a sort of reply? Is it a question of fact or a question of law?

MR. CONNOLLY: Well, it is a question of law, Your Honor, and as I say, I can demonstrate that very clearly.

They say at page 12, or the bottom of page 11:

"It cannot be argued that the defendant was performing some function for the agency under Section 403 (d) (4) or (5) either in collaboration with another intelligence agency or at the direction of the National Security Council in as much as Section 403 (d) (3) contains a mandate excluding participation of the agency from 'internal security functions.' Accordingly statutory authority for the conduct of the defendant against the plaintiff is nonexistent."

Now, I say that probably it is a mixed question of fact or law, the fact of which is uncontradicted.

The record in this case, indeed the complaint and the answer show that we are dealing with Estonian emigre

matters. We are dealing also with an alien. So we are not dealing with the internal security of the United States.

THE COURT: Well, we are dealing partly, largely with internal security, aren't we? Isn't that what the talk was about largely?

MR. CONNOLLY: No, Your Honor. Let me say this.

THE COURT: I know, but you make such sweeping statements. It is not certainly limited to internal security, but to say that it has nothing to do with the internal security of the United States seems to me--

MR. CONNOLLY: I do not say it has nothing to do with it any more than I say or neither can I accept the plaintiff's contention that the CIA has nothing to do with the internal security of the United States.

THE COURT: All right. I think that is right, but this case is not going to be decided by everybody just making these wild sweeps at each other. The Court has got to get down to what the real facts are, and that is why I am suggesting that there should be some effort to narrow the field of dispute.

You have got this sweeping affidavit which could be more specific, just this broad conclusory affidavit which may be--well, I do not know. Mr. Prettyman shakes

his head that it cannot be more specific.

I do not know whether it can or not. I am satisfied though that the person who says it cannot be more specific is the Government of the United States and not the defendant.

MR. CONNOLLY: Well, my point is, Your Honor, and I think this is where you and I got into a bit of altercation this morning. I really do not think that this is a matter of argument that the plaintiff and the defendant have.

THE COURT: Well, let's see.

MR. CONNOLLY: I do not think they can question the fact that Raus--

THE COURT: Well, just ask him a couple of questions and let us hear what he has to say because I read his brief and I understood he did question it.

Now, there may be some matters as to which I--there are many situations on the bench, there are certain matters in which the judiciary must take, and very probably so, the certification of the executive, and I am quite prepared to do that; but it is done on the authority of the government and not on the basis of a litigant who does not want to pay damages.

MR. CONNOLLY: Well, Your Honor, we have not done it. That is, we have raised the defense, and we

submitted an affidavit.

THE COURT: You have not raised the defense actually. You did not complete it.

MR. CONNOLLY: Well, I thought we had gotten over that.

THE COURT: Well, you have not gotten over it; you are going to have to file an amended answer.

MR. CONNOLLY: May we have leave to do that?

THE COURT: You may have leave. Well, I have not heard from the plaintiff.

I have read the plaintiff's brief. If he had nothing to add, that is his memorandum on the subject, and I will grant you leave, and there is no use in just repeating what is said in the brief.

I will grant you leave to file an amended answer. The plaintiff's attorney shook his head that he has nothing to add, and on the basis of what I read I will grant you leave to file an amended answer.

Now, I think that you may want to consider whether you want to file a more detailed affidavit. If you do not file a more detailed affidavit my disposition is to allow the plaintiff to file a limited number of questions raising--I do not see, and he cannot submit interrogatories to the government. So I think it has to be either a matter of a deposition.

MR. CONNOLLY: Well, he can try to take a deposition.

THE COURT: Oh, he can try to take depositions.

MR. CONNOLLY: Very well, sir.

THE COURT: He is entitled to take depositions, and I think on matters of this importance it is sufficiently serious that if the man cannot come to Baltimore, if he is too busy to come to Baltimore, I will go to Washington and will sit in any courtroom that is most convenient to him in Washington and take his deposition and then we can rule on the questions so we do not have to waste time certifying things back and forth.

MR. CONNOLLY: I am not going to take on that burden, but as soon as he gets a subpoena there will be a motion to quash, I feel fairly certain based upon Section 403 (g).

THE COURT: There may well be, and then I will face that problem when I come to it.

This is a private litigation. It has obvious public importance, and I am quite prepared to protect, I hope as far as I can, the interests of the United States, and I am quite willing to recognize that there comes a point in which the executive can put certain limitations upon the judiciary.

They have done it before, and I have also found a number of times when even the United States Attorney says, "You cannot do this," that on a little sober second thought some facts were developed which clarified the situation.

So that I am not going to abuse my position in the judiciary as against the executive. On the other hand, I am not going to let a private attorney a fortiori because I would not let the United States Attorney talk me out of something that I think is right until that privilege is claimed, and I think in the private litigation this affidavit is sufficiently general, with the other circumstances I have spoken of, that the plaintiff ought to be entitled to a modest number of questions.

MR. CONNOLLY: Well, my position is that I think the affidavit is sufficient, and I suggest to Your Honor, if you want to discuss the question of the kind of affidavit, let us do that, and we will postpone this thing until we take it up at another time.

THE COURT: Well, I have been hearing you, or rather I guess you and I have been debating most of the time.

MR. CONNOLLY: I am sorry.

THE COURT: And maybe the plaintiff would like to debate with me.

MR. CONNOLLY: I always find I never do well in court when I begin to involve the Judge in argument.

THE COURT: All right. Well, it seems such a tremendously elaborate case, and I do not profess to be an expert in this field, and I have said about all I can say of my respect for the executive, and my belief that I must use the power of the judiciary as I see fair up until I am stopped.

MR. CONNOLLY: The only disagreement I have with Your Honor, I think Your Honor's procedure is really spelled out in the Supreme Court case called Reynolds vs. United States 341 U.S. 1.

MR. STANFORD: 345.

MR. CONNOLLY: 345. 345 U.S. 1.

THE COURT: Isn't that the one with Jacobs? Anybody here remember Jacobs?

MR. CONNOLLY: That was a Federal Tort Claims Act case?

THE COURT: Yes.

MR. CONNOLLY: That was a case where an airplane goes down, and the government is sued under the Federal Tort Claims Act, and they tried to take some depositions of the crew who survived. Some of them survived, and they tried to get some production of documents, and there was a claim of privilege.

THE COURT: Yes.

MR. CONNOLLY: And the Court held that you ought to treat this claim of governmental privilege just like you treat self-incrimination that you inquire a while until it becomes clear as a judicial decision that the privilege is justified.

THE COURT: That is the one. I had a man who invented, who was suing the government because he was supposed to have invented a new way of doing some sort of thing, that it was so much cheaper that he could do it with a shoestring and a pin with what people were paying General Dynamics all this money to. He had some very good ideas, but was an extremely impractical fellow, and he filed suit against the government or the government filed suit against him, and there were a number of questions, and we finally managed to get some things in, and there were a lot of holes cut in the contract, and we gave all that was necessary to work out the problem.

Now, it often may be possible to get here all that would satisfy a person that this was in the course of his employment, or subject to maybe the legal point that this is not CIA business anyhow. I do not know; I am not expressing any opinion on that, but I do not want to quite throw up the sponge quite yet.

MR. CONNOLLY: Well, I think the way to

distinguish this case from Reynolds, if it is possible for me to distinguish it, and it is intellectually satisfying to me, though it may not be to Your Honor.

But in the Reynolds' case the apparent nature of the privilege was not too apparent; it was not the nature of the privilege that was not too apparent, but the necessity for it was not too apparent, and it was being claimed as a matter of evidentiary law.

In this situation it is not necessary for Your Honor to inquire and make inquiry because of the language of the statute.

THE COURT: I see your point, but the Director has waived his privilege up to a point by making this affidavit. This affidavit was presumably prepared by him with your co-operation.

MR. CONNOLLY: I wish it were with my co-operation.

THE COURT: I mean, you must have asked him to do it.

MR. CONNOLLY: Yes, that is true.

THE COURT: But it is not yet apparent to me that he would not say one or two further sentences which might clarify the matter completely.

MR. CONNOLLY: Could Your Honor indicate what those sentences might be?

THE COURT: It is not for me. It is for Mr. Raskauskas to make the suggestion and for me to say whether I think they are prima facie good ones and then for the government to decide whether they want to raise the question and for me either to say I bow or this is a subject on which I should bow or whether this is a subject on which I should not, but I can't now.

I am not going to undertake to say it in advance, but I think you can all imagine what they might be. I can't be sure that if asked whether he would say one or two more things which might clarify the matter, he will either say no or he will not say no, and there is no way of telling that until it is tried.

MR. CONNOLLY: Well, if you have in mind the purpose for which the statement was made I do not think they will answer that.

THE COURT: I do not know that the purpose has anything to do with it.

MR. CONNOLLY: I think that is really what Mr. Raskauskas wants to find out.

THE COURT: It could be. It could be.

All right. Let us hear what he has to say.

MR. STANFORD: My name is Robert Stanford, Your Honor.

THE COURT: Yes.

MR. STANFORD: Mr. Raskauskas a little earlier in the week had an operation on his jaw, and although he sounds pretty good to me, he has asked me to speak today.

I think that something that Mr. Connolly said much earlier must be taken into consideration, and I think this has pervaded their entire memorandum, and that is that we are looking at this from the wrong direction. This is not something--I think he made allusion to the fact that it would be too bad if in the erection of this defense it would cause difficulty to Eerik Heine, but he said that is one of the things that is the price of this privilege.

I think that we must look at it from the other standpoint because, is it too bad if the defendant in this case is unable by statute to demonstrate that this was within the scope of his employment? We have here a situation in which he has been accused of making defamatory statements of a man who is, as Mr. Connolly said, a well-known and militant anti-communist in the Estonian community, the plaintiff.

He has used as a defense, after having waived this for a period of thirteen months, he is now using the defense of immunity, governmental immunity, and he bases that upon his pointing out or pointing to Mr. Richard Helms and saying, "This man can testify on my behalf if he were

allowed to testify, but he is not allowed to say anything, and I can testify on my behalf and justify the fact that this was government privilege or immunity, but I cannot say anything."

We argue the fact that this entire case must be looked at from the other side rather than from the side which is propounded by the defendant. That is, we do not ask in this motion that they produce any further facts, although we ask in our interrogatories that they produce many facts; but on the basis of this affidavit alone we do not ask that they produce any more facts.

We say that we can't contradict it because we can't gain information, but that they have not said a sufficient amount to justify their motion, and they themselves have circumscribed their ability to say anything more.

They have claimed that for them to say anything more would be to commit a crime or to violate the statutes of the United States.

Therefore, we feel that on the basis of this conclusory statement of Richard Helms who has been judge and jury in this particular case up to now that the motion should fail.

Now, that is our general view of this entire matter, and we feel that it should be looked at in that way

rather than from the other side.

I think Your Honor has said repeatedly that they must produce information to justify their position on government privilege unless they are unable to do so; and their being unable to do so is a matter which must be asserted by the government or by the defendant himself upon statement in affidavit. This has not been done.

Therefore, the motion should fail as it stands. Now, I do not wish to go any further at this particular time. We are willing to co-operate, as the Court has suggested, along the lines that the Court has suggested. We do not wish to argue further that there has been a waiver any further than we have outlined in our memorandum.

We feel that there has been, and we think that must be taken into consideration in the matter in looking with some incredulity toward their affidavit, the affidavit of Richard Helms.

If everything they did and said at the time this defense was pleaded omits the fact that the defendant was a CIA agent and seems to cloak, as Your Honor said "cryptically," the fact that he was an agent, this is inconsistent with their present action.

THE COURT: Did you give me the statute which says that it is illegal for a CIA agent or employee to

divulge this?

MR. CONNOLLY: I gave you the general provision of the Criminal Code, Your Honor. I looked for it, but I did not give it to you, but I found it. It is 1905, Title 18.

THE COURT: 18, 1905.

MR. CONNOLLY: Yes, Your Honor.

It is:

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment."

THE COURT: Wait a minute. I am not so sure that is clear.

MR. CONNOLLY: Well, Your Honor, I will tell you, it is clear when you read Section 403 (g) of Title 50 and Executive Order 10501 which is set forth in the 1966 pocket part.

THE COURT: Is that in yours?

MR. CONNOLLY: Yes.

THE COURT: In your brief?

MR. CONNOLLY: Yes, it is referred to.

THE COURT: Executive Order?

MR. CONNOLLY: 10501.

THE COURT: 10501. All right. And you say if I read 18 U.S. Code 1905 with these two I will have it?

MR. CONNOLLY: 1905 prohibits the employee from divulging it.

THE COURT: Yes.

MR. CONNOLLY: And 403 (g) of Title 50 excludes the Director of Central Intelligence Agency from any obligation to disclose it to anyone, and it says it specifically.

THE COURT: That is the obligation but it does not say that he may not because here you have your very cases that he was authorized to disclose the fact that this man was a communist.

So to say that you cannot disclose anything is inconsistent with the position you have taken.

That is the thing that is bothering me in this case. You say he cannot disclose anything but your defense is that he did disclose something.

MR. CONNOLLY: I say he cannot be compelled to disclose anything; he does not want to disclose it. It has to be within the agency's discretion.

Let me read you this language.

THE COURT: Well, I know, but the question

that he cannot be compelled--if he elects to say less than he has a right to say he cannot complain if I deny his motion for summary judgment.

MR. CONNOLLY: It is not his motion for summary judgment.

THE COURT: It is your motion for summary judgment?

MR. CONNOLLY: If it is not the Deputy Director.

THE COURT: But the Deputy Director has not raised any privilege yet. I do not know whether he would say more or not. I have no way of telling whether this affidavit of his is as far as he is willing to go, and there is no way of telling it unless he is subpoenaed.

MR. CONNOLLY: Well, let us find out whether he will go further.

THE COURT: All right. The way to find out is either to ask Mr. Kenney to take it up with him or for the Court to issue a subpoena.

MR. CONNOLLY: Or to continue it and see if we can't talk about it and maybe do the latter thing and maybe we can get Mr. Kenney to go along at the same time.

THE COURT: I think we have got to know what we are going to do. In the first place you are going to file your amended answer setting up the points. Then

you have got to decide, do you want to continue to proceed on summary judgment or do you want to accept the suggestion that we try the issue as a separate issue and then let each side put on as much as they can and try the thing as a straight issue and get rid of it?

This is one of the two issues other than damages in the case.

MR. CONNOLLY: I would think what I would like to do with Your Honor's indulgence, if I had my choice, would be, I would like to continue this matter. I would like to see whether Mr. Helms will not give an affidavit in somewhat more detail. Now, whether Mr. Raus will be permitted to say something more--

THE COURT: All right.

MR. CONNOLLY: If not, then I think we will stand on the motion, and if Your Honor denies it, then I would think in the interest of expedition that you might very well wish to try this issue as a factual matter first because I tell you if we have to get into the problem of proving truth in this case we are going to range the length and breadth of the United States and Canada and probably all over, Europe too.

THE COURT: I would think you would be willing to try the issues separately. The plaintiff is, and I should think you would be willing to try it and get

whatever facts, as much truth as we can into the record.

If you do not want to I will have to rule on the motion for summary judgment when it comes up.

MR. CONNOLLY: All right. May we then--

THE COURT: But I have not given Mr. Stanford a real chance to say his piece. I have just asked you some questions.

MR. STANFORD: Your Honor, we would like to have a ruling on the motion today. I think we did cite a case in our memorandum to the effect that all of the facts which counsel are aware of which can inform the Court of the position should be presented.

At this time they have said specifically that they have presented as much as they possibly can and that to disclose more would be secret.

THE COURT: Well, what is the advantage in saying that I deny the present motion without prejudice to his leave to file another one or let him file an amended answer and see whether he wants to stand on this?

I do not want to bring people back and have argument after argument on this unless he can get a voluntary affidavit further, and I am not just going to accept some flat letter from the head of the agency that, "We are not going to say anything more."

Somebody is going to say that on the witness

stand here, and I am not going to have the matter handled in any way other than through the United States Attorney without bringing somebody here or by going there.

I do not think the judiciary has the right to require the executive to be inconvenienced any more than the executive has the right to require the judiciary to be inconvenienced, and I am perfectly willing to go to Washington to take his deposition and to let him make whatever claims he wants.

But if you are going to file a new affidavit you might as well file a new motion because you need not write a new brief.

MR. CONNOLLY: I would like a continuance, Your Honor, because I think, Your Honor, this is a matter which requires some serious policy discussions.

THE COURT: I think there is no doubt about that.

MR. CONNOLLY: Yes.

THE COURT: And you can talk about it, and I do not think it makes much difference on a continuance whether I deny it without prejudice or whether we continue the matter with leave to amend.

Maybe since I have not read all of the cases the thing for me to do is simply to grant leave to file an amended answer and you can decide whether you want to file

an amended motion, and Mr. Stanford can decide what questions he wants to put.

He may file further interrogatories to you dealing with this specific issue.

He has a right to ask your man for interrogatories, and he has a right to try to take the deposition of the associate director. He may decide he wants to do one or not to do one; but I am not going to grant any motion for summary judgment until he has had a chance to follow one of those lines.

MR. CONNOLLY: If Your Honor will just indulge me about thirty seconds, may I tell you how we view this case or how this case can be viewed by people in responsible positions?

Let us assume that a man is a Soviet agent.

THE COURT: All right. I am willing to assume that for the purpose of the argument.

MR. CONNOLLY: And he is exposed so that his effectiveness is lost. The Federal Rules of Civil Procedure, the discovery rules there, give him a very nice opportunity to inquire into the mechanisms of procedures by which he was exposed.

This therefore becomes a policy matter as to how far the agency is going to involve itself. This is one of the reasons why there was some delay even asserting this

claim of privilege.

THE COURT: I understand that, and as I say, I think I am quite willing to protect the agency as far as the agency wants protection.

One of the counsel of Mr. Provo sitting in the room, I think he will say that I protected the agency as far as the agency demanded protection, and as I have said before, I will do that. But I am not going to let you as counsel for this defendant be the judge of how far the agency shall go, and it is just as simple as that.

MR. CONNOLLY: I do not propose to do that, Your Honor.

THE COURT: All right.

MR. CONNOLLY: I hope you understand that.

THE COURT: All right.

MR. CONNOLLY: I was merely saying to Your Honor that I thought the statute precluded judicial inquiry into the matter.

THE COURT: It may be, but so did it in some other cases in which some additional facts were produced.

MR. CONNOLLY: Well, would Your Honor be pleased then to put this matter over again, and I will advise you?

THE COURT: Let us see how far you can go. I understand that it must be difficult to work it out. You

can file your amended complaint.

How long do you want?

MR. CONNOLLY: I think I can do that within ten days.

THE COURT: He is going to file an amended answer, and he can decide whether he wants to file an amended motion for summary judgment or a supplementary affidavit.

After they are filed and the plaintiff sees what it has to meet, then the plaintiff can say what it wants to do, whether they want to file interrogatories to you, and if they want to prepare interrogatories to the defendant, you can do it now.

MR. STANFORD: We have, as Your Honor well knows, propounded 424 interrogatories, which happen to be exactly 500 less in number than the pages of the deposition taken by the defendant.

THE COURT: I know, but there is a difference between that, and I was looking at them, and a lot of them do not seem to me to be--do any of them go to this issue?

MR. STANFORD: They go to the preliminaries which would decide that issue, Your Honor.

THE COURT: You mean they--

MR. STANFORD: That is, they go to the factual situation which would decide the issue.

THE COURT: Well, let him indicate which ones you think bear on this issue that we are talking about as distinguished from the truth of the charge.

MR. STANFORD: Well, I do not think I could advise the Court.

THE COURT: Well, look them over and tell me which of those because I think we are going to decide the issue of privilege first.

I want you to have whatever discovery you are entitled to on the issue of privilege, postpone the other discovery, and we can dispose of this issue of privilege either on summary judgment or on the trial on the merits of that issue.

MR. STANFORD: Your Honor, as a procedural matter what I asked for, the defendant would claim privilege on any of those 424 questions which have been propounded.

MR. CONNOLLY: Oh, certainly.

MR. STANFORD: Do you claim privilege on all of them?

MR. CONNOLLY: I do not know yet. I objected to 325 of them. I said 325 of them were objectionable on their face.

THE COURT: But you have not said which of them.

MR. CONNOLLY: No, I have not red-starred them, but I would be happy to send you a copy of it.

THE COURT: Well, cut it down to what you think you are entitled to, Mr. Stanford, on the issue of privilege, and I will undertake to rule on those on which they object to.

MR. STANFORD: Since we have reached this impasse, Your Honor, I do not want to waive any of the other arguments that we have on the motion, and I think it would be better if we waited until that time to raise the other issues that we have.

THE COURT: That is right. All right. That will be all right. You may preserve all your others. The only thing I have ruled on is that I have given them leave to amend.

MR. CONNOLLY: Your Honor, you have 333, and would you return that or I will because I am charged with it?

MR. STANFORD: Your Honor, I just wanted to clarify the ruling on the motion itself. Has that been denied with leave to amend, Your Honor?

THE COURT: I will grant him leave to file an amended answer. My feeling is that in view of the points raised in the affidavit of Mr. Helms, the fact that a defendant who is sued may have difficulty because there

may be an appropriate case of public reasons why he should not raise the issue of privilege by giving away an inside man or giving himself away, I think it is a perfectly reasonable reason for delaying raising the question.

I think it overrules or I think it overweighs the perfectly valid point that you have made on the other side.

MR. STANFORD: Well, Your Honor, I would ask Your Honor to amend that into, or to deny the motion to amend for this reason, that when the defendant amends his answer that then I think there would be a new motion which would be appropriate rather than this motion.

THE COURT: You mean it will make a difference. Yes, I will be glad to hear your other motion, and if you want I will scratch out something, and I gather that I am being given to understand by the defendant that the reason that he did not raise this defense more explicitly originally was because he considered he was not authorized to do it.

MR. CONNOLLY: Because he was not a free agent.

THE COURT: Until this affidavit of Mr. Helms was obtained. Isn't that correct?

MR. CONNOLLY: That is correct, Your Honor. I represent that to you.

THE COURT: Do you dispute that? If so I will make the defendant swear to it or if counsel make that statement, I suppose you would accept it unless you want to cross-examine counsel.

MR. STANFORD: We do not know that to be a fact.

THE COURT: Well, how are we going to establish it as a fact? Let Mr. Connolly take the stand so you can cross-examine him.

MR. STANFORD: No. I do not ask that, Your Honor.

THE COURT: Well, he has just made that statement, as I understand it.

MR. CONNOLLY: I represent to you solemnly, Your Honor, that this defense, of course, occurred to us at the beginning. We had to consult with our client and others interested in this case, and the decision was that that would not be raised first, and it was that when discovery came forward that we convinced the other persons interested to raise it.

Now, we were permitted to raise it only for the first time on that occasion.

THE COURT: You said, "would not be raised."

MR. CONNOLLY: No.

THE COURT: You mean could not legally be

raised?

MR. CONNOLLY: Well, they would not raise it, would not raise it.

THE COURT: You mean they would not allow you to raise it?

MR. CONNOLLY: Yes.

THE COURT: All right. Now, you say other people. It was not the decision of your client?

MR. CONNOLLY: Yes.

THE COURT: All right.

MR. STANFORD: I would like Mr. Raskauskas to respond to that.

THE COURT: All right.

MR. RASKAUSKAS: Well, Your Honor, I want to address myself to this one point which I think would be of assistance to both counsel and to the Court.

I think if Your Honor would deny this motion today without prejudice it would put the file in a posture so that they could file a new motion for summary judgment in contemplation of their amended answer because it will clutter the file up somewhat if we are working with an amended answer, I think.

THE COURT: I think that is right.

MR. CONNOLLY: Your Honor, can I be heard on that?

THE COURT: All right.

MR. RASKAUSKAS: I would like to address myself on that point, and one additional point, Your Honor.

THE COURT: Well, let us see where we stand.

MR. CONNOLLY: Yes.

MR. RASKAUSKAS: This is very unfortunate and it is very tragic if Juri Raus, the defendant, who slandered my client did not have the right to plead a good defense if he has such a defense at the outset just as if unfortunately that one of the heroes of World War II should be permitted to be slandered; but our contention is that if he did not avail himself of this defense because of his involvement with the CIA, that is tragic and unfortunate, but it does not help him personally.

He has personally waived that defense.

THE COURT: No, he did not. I think if he was not allowed to do it by law and he did not waive it because you cannot do something that you have no right to do.

If he was not granted permission to do it until just recently when this affidavit was filed then he has a right to do it.

Now, Mr. Connolly has represented that he was not allowed to do it by law, by his superiors, that he was prohibited from entering this defense.

Is that what I understand?

MR. CONNOLLY: That is correct, Your Honor, and I am prepared to prove it.

MR. RASKAUSKAS: I would like to know where Mr. Connolly got his information for that?

THE COURT: Mr. Connolly, be sworn and take the stand.

MR. CONNOLLY: I will prove it through Mr. Prettyman.

THE COURT: All right.

Thereupon

E. BARRETT PRETTYMAN, JR.

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CONNOLLY:

Q Mr. Prettyman, state your full name, please?

A E. Barrett Prettyman, Jr.

Q Are you a member of the Bar of the United States District Court for the District of Columbia?

A I am.

Q And the Supreme Court of the United States and the United States Court of Appeals for the District of

Columbia?

A Yes, sir, I am.

Q Do you have any experience in government?

A Yes, I was former Special Assistant to the Attorney General of the United States and Special Assistant to the White House.

Q When did you leave your service in the White House?

A In July of last year.

Q Shortly after leaving did you have occasion with me to visit the headquarters of the Central Intelligence Agency at Langley, Virginia?

A I did.

Q Did you there discuss a libel suit or a slander suit that had been brought by Eerik Heine against Juri Raus with an attorney of the Central Intelligence Agency?

A I did.

Q Was I present?

A You were.

Q Tell us whether or not we discussed with that attorney the question of raising a defense of absolute privilege in this case?

A Yes, we did.

Q What response did we get at that time?

A That we do not have permission in view of the law to raise that defense.

Q Do you think that you are free from the tenor of that conversation to disclose the name of the person who told you that?

A Frankly, Mr. Connolly, I would think not.

MR. CONNOLLY: Those are all the questions I have.

THE COURT: Well, when was this? When did this happen?

THE WITNESS: This, I cannot give you the month, Your Honor. It was shortly after I left the government service. It was within the last--Mr. Connolly, can you refresh my recollection from your file?

MR. CONNOLLY: I think we can take it--Your Honor, I would have to look at my diary, which is not here, Your Honor, but shortly after the suit was filed.

THE COURT: All right.

MR. CONNOLLY: The suit was filed in November of 1964.

THE COURT: Yes.

When did you leave government service?

THE WITNESS: When I said last year I meant, it would have been '64, July of '64.

THE COURT: You left government service in

July of '64?

THE WITNESS: Yes, sir.

THE COURT: All right. Do you want to cross-examine?

MR. CONNOLLY: I have just one or two questions.

Just a minute.

MR. STANFORD: All right.

BY MR. CONNOLLY:

Q Upon receiving, Mr. Prettyman, this lengthy list of interrogatories from the plaintiff did you again journey with me to the Central Intelligence Headquarters?

A I did.

Q Did we then discuss again the question of raising the defense of absolute privilege?

A We did, yes.

Q What response did we get on this occasion?

A We were then told that the agency would consider the submission of an affidavit, which subsequently was forthcoming along the lines of the affidavit that has been filed.

THE COURT: All right.

MR. CONNOLLY: That is all.

THE COURT: Cross-examine.

BY MR. RASKAUSKAS:

Q Mr. Prettyman, had there been any change in the secrecy law respecting the Central Intelligence Agency between your first and second visits to that agency?

A So far as I know, none.

Q And is it a correct statement that on the first visit that you were forbidden to use the defense of privileged immunity?

A Yes.

Q Because of that law?

A Well, I presume so, yes. The law was pointed out. We discussed the law, and we were told that the man's capacities and duties were such that this could not be disclosed and therefore that the statements which we would like to have put in the answer the first time, which would have claimed absolute privilege, could not be claimed.

Q Now, can you explain to the Court why you were permitted to do on this occasion for the summary judgment what you were forbidden to do on your earlier visit with respect to the secrecy law?

A I do not know the policy reason or other reason that the agency decided to change its stand. I do know that there had been an intervening factor of the interrogatories which would have sought this particular

information.

Q So it was on the--

A From Mr. Raus relating to his employment.

Q So would it be a fair statement then that it was the factual change in this case rather than the change in the law, the secrecy law, which permitted you to raise the defense of absolute immunity?

MR. CONNOLLY: I object to that.

MR. RASKAUSKAS: I have no further questions.

THE COURT: Did he answer it?

THE WITNESS: No.

MR. RASKAUSKAS: I will withdraw the question.

THE COURT: Well, I think it is a matter of inference.

MR. RASKAUSKAS: Yes.

THE COURT: And argument. I think you have developed facts.

MR. RASKAUSKAS: Yes, sir.

THE COURT: All right. Thank you.

MR. CONNOLLY: Your Honor, I would ask you to please continue the motion rather than making a ruling on the merits.

THE COURT: I have indicated that I would make certain rulings in view of the testimony, and of

course will write an opinion and will indicate in the opinion what my rulings are.

MR. CONNOLLY: Thank you, Your Honor.

(Thereupon, the hearing was concluded.)

- - -

Certified to be a true and correct transcript of the proceedings in the above case.

Official Reporter

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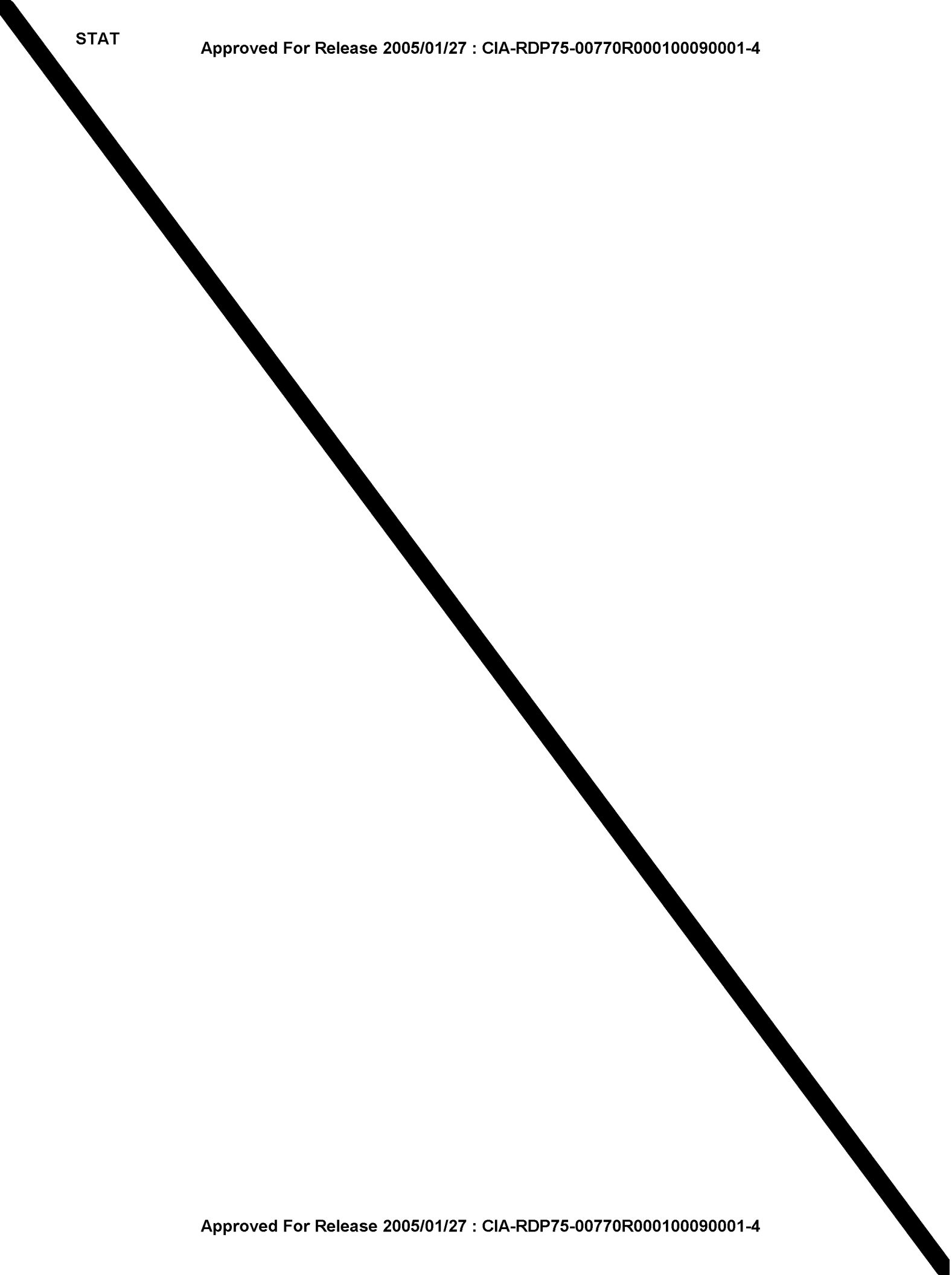


Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	:	
Plaintiff	:	
vs.	:	Civil Action No. 15,952
JURI RAUS	:	
Defendant	:	

POINTS AND AUTHORITIES IN OPPOSITION TO
THE DEFENDANT'S MOTION TO STRIKE INTERROGATORIES

Comes now, the plaintiff, Eerik Heine, by his attorneys, Ernest C. Raskauskas and Robert J. Stanford, and opposition to the motion to strike interrogatories respectfully states unto this Court that the relief herein sought should be denied for the following reasons:

1) Defendant alleges that 424 interrogatories, by their numerical weight alone, constitute an oppressive burden on him. In some cases 424 interrogatories might appear oppressive, but this contention becomes rather unseemly when defendant, himself, has taken the deposition of Eerik Heine, a veritable 942-page autobiography under oath of the plaintiff. "The guide is not the number of interrogatories propounded, but rather it is whether or not the demand is reasonable as viewed with relation to the particular case." Conuso v. City of Niagara Falls (WD NY 1945) Case 1, 4 FRD 362. The fact that plaintiff had a choice between interrogatories and depositions does not bar the use of interrogatories. Hoffman v. Wilson Line Inc. (ED Pa 1946) Case 2, 7 FRD 73. This objection of oppressiveness comes some seven weeks after the interrogatories were filed, and after defendant had been given several extensions of time in which to file answers and objections. Moreover, general objections to interrogatories such as claims

that (1) a party may have to make research and assemble data, (2) that the interrogatories are unreasonably burdensome, oppressive and vexatious, (3) that the interrogatories seek information readily available to the interrogating party, (4) that the interrogatories would cause annoyance, expense, and oppression to the objecting party without serving any relevant purpose to the issue, areall general objections which have been repeatedly held as insufficient by the Federal Courts. (See 4 Moores Federal Practice 33.27.) Hickman v. Taylor (1947) 329 US 495, 67 S Ct. 385, 91 L ed 451, has held that the presumption is for discovery.

2) Plaintiff does not have the resources of the defendant so that he might indulge in the luxury of a 942-page deposition. Rule 33 provides for interrogatories so that all litigants may have an opportunity for discovery, irrespective of their economic situation. Moreover, many of the interrogatories propounded by the plaintiff are such that are not susceptible to adequate answer upon oral deposition.

3) Defendant claims that a great number of the questions inquire of privileged matter and 325 of the interrogatories are obviously objectionable on their face. No specific objections to individual interrogatories are made. This Court and the plaintiff are left to speculate as to which interrogatories the defendant finds objectionable. Such a general objection is not only untenable under any decided case law, but it also indicates a flagrant disregard by the defendant of the plaintiff's right of discovery.

4) The general objection of immateriality is not only the last claim by the defendant, but the most presumptuous. The claim of immateriality is based on the contention that the defendant will prevail on his motion for summary judgment.

5) Rule 33 FCRP, requires that the defendant serve written objections together with a notice of hearing the objections at the earliest practicable time. Defendant has not filed the required notice and therefore his motion should be denied as not properly filed.

Respectfully submitted,

/s/
Ernest C. Raskauskas
1418 Ray Road
Hyattsville, Maryland
Area Code 202 296-4272

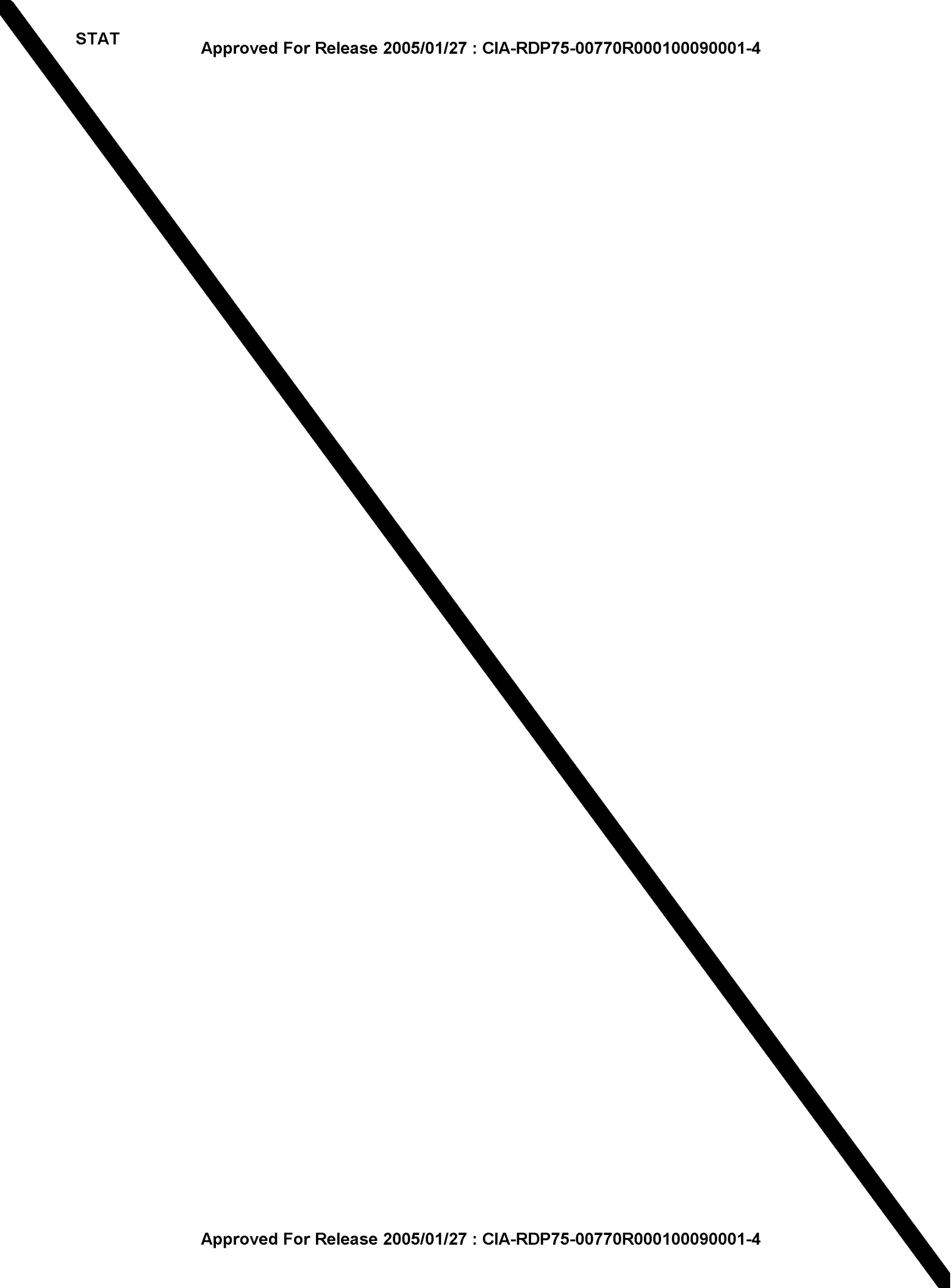
/s/
Robert J. Stanford
10401 Grosvenor Place
Rockville, Maryland
Area Code 202 296-8870

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were personally served upon Paul R. Connolly, Esquire, and E. Barrett Prettyman, Jr., Esquire, Attorneys for Defendant, to their office address at 815 Connecticut Avenue, N.W., Washington, D.C. 20006, this 23rd day of February, 1966.

/s/
Ernest C. Raskauskas



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	:	
Plaintiff	:	
vs.	:	Civil Action No. 15,952
JURI RAUS	:	
Defendant	:	

ORGANIZATION OF MEMORANDUM OF OPPOSITION TO SUMMARY JUDGMENT

1. The issue of absolute privilege is not before the Court for determination since it has not been pleaded in accordance with Rule 8(c) FRCP and Rule 15(a), and defendant has waived this defense.

2. There exist numerous genuine issues of fact, including but not limited to the materially conflicting statements in the affidavits submitted by defendant.

3. The affidavit of Richard Helms in support of the motion for summary judgment is insufficient under Rule 56 in that it fails to state personal knowledge, fails to set forth facts which would be admissible in evidence, and the affidavit fails in that affiant is not competent to testify at trial.

4. The statements by defendant complained of were not privileged as officially immune, since they were without or beyond statutory authority.

5. There is an omission of essential facts relevant to the capacity, purpose, scope, extent of authority, and nature of employment of defendant Juri Raus concerning the statements complained of which conclusively precludes consideration of such factual questions as "outer perimeter" and concomitantly renders resolution by summary judgment impossible.

6. A decision as to whether a privilege should be considered under state law or under Federal law is premature until there is a resolution of the issue of scope of employment.

7. Employment by an agency, alone, does not provide a privilege to an individual. A judicial determination examines with scrutiny the normal scope of agency powers, in accordance with duties and customary behavior, with reference to external circumstances.

8. Plaintiff has not had the benefit of discovery, although attempted but opposed by defendant, and thus is not able to respond to the conclusions stated in defendant's affidavit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	:	
Plaintiff	:	
vs.	:	Civil Action No. 15,952
JURI RAUS	:	
Defendant	:	

MEMORANDUM AND POINTS AND AUTHORITIES
IN OPPOSITION TO THE DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Comes now the plaintiff, Eerik Heine, by his attorneys, Ernest C. Raskauskas and Robert J. Stanford, and in opposition to the Motion for Summary Judgment respectfully state unto the Court that the relief herein sought should be denied for the following reasons:

1. Defendant's Motion for Summary Judgment is founded upon a claim of absolute privilege which he claims is now a fixture of Federal law applicable to defamatory statements made by all Federal officers of any rank the "outer perimeter" of whose duties authorize them to speak or write of another or who speak or write defamatory matter in the discharge of their official duties. The defendant further claims that the matter is to be determined without regard to the rules of privilege under state law and that the question calls solely for the application of Federal standards. This defense is raised for the first time, and exclusively, by the contents of an affidavit executed by one Richard Helms, executed on the 30th day of December, 1965, approximately thirteen months after the institution of plaintiff's complaint.

Plaintiff contends that under the present posture of the pleadings, a new defense asserted for the first time, and then only in affidavit form, accompanying a motion for summary judgment

by the defendant, does not bring said defense properly before the Court at this time for a resolution of the same under the provisions of Rule 56, FRCP. The defense of absolute privilege or absolute immunity cannot be considered as a negative defense by any stretch of the imagination, and under the requirements of Rule 8(c) FRCP, defendant was obliged to plead absolute privilege or absolute immunity as a "matter constituting an avoidance or affirmative defense." 1/ Therefore, since this defense was not affirmatively asserted in the answer it cannot now be presented to the Court for determination. This is not an attempt by the plaintiff to resolve this issue of absolute privilege on the niceties of pleading, and although the mandate of Rule 8(f) requires that all pleadings be so construed as to do substantial justice, nevertheless, in order to avoid waiver of the defense which he nows asserts by affidavit, the defendant must satisfy two conditions precedent in order to have this issue of absolute privilege considered. First, he must comply with Rule 15(a) and obtain leave of Court in order to amend his answer to include the

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1/ Defendant claims that the question of absolute privilege and absolute immunity is a matter to be determined without regard to the rules of privilege under state law. Accepting this statement for the purpose of argument, plaintiff contends that reading Rule 8(c) in the light of Erie Railroad Co. v. Tompkins (1938) 304 US 64, 58 S Ct. 817, 82 L ed 1188, 114 ALR 1487, that the Court is being presented with a Federal matter which is to be resolved by Federal statute, Federal common law, and the Federal Rules of Civil Procedure with respect to the pleadings. Accordingly, since the plaintiff's prima facie case did not raise any Federal question or consideration of absolute Federal privilege or official Federal immunity, in order for the question of absolute privilege to become a legal issue in this case, a true affirmative defense of absolute privilege or official immunity was required of the defendant in his answer, which he has failed to allege, and such failure to plead an affirmative defense results in the waiver of that defense and its exclusion as an issue in the case. Alexander v. Alexander, D.C.S.C. 1956, 140 F.Supp. 925. C.J.S. Federal Civil Procedure §§ 306, 308 Barron and Holtzoff, Federal Practice and Procedure, §§ 277 et seq. 3321, 3336 et seq. 3362 et seq. Moore's Federal Practice 8.27 [4].

and having caused the plaintiff to change his position, and shape his prosecution of this cause for a resolution on the merits, defendant should not be permitted to assert the defense of absolute privilege at this time. By his conduct of this litigation he has waived his right to assert this defense and the reason for the rule as announced in Barr v. Muteo, i.e., the protection of a government official from the onus of any litigation, is no longer evident in this case. He has voluntarily submitted to the burden of a trial and to the inevitable danger of its outcome, so that the reasoning of Gregoire v. Biddle does not now apply.

2. There exist numerous genuine issues of material fact.

Controvered allegations can only be resolved by trial on the merits and not by use of summary judgment, Free v. Bland, (1962) 82 S Ct. 1089, 369 U.S. 663, 8 L.ed.2d 180. The denial of a motion for summary judgment is appropriate when legal issues are of particular significance or particularly complex or where legal issues can be intelligently resolved only upon a fully developed record, Anthony Grace and Sons, Inc. v. U. S., Court of Claims 1965, 345 F.2d 808. A summary judgment remedy is extreme and not to be used as a substitute for trial and any doubt as to the existence of a triable issue of material fact must be resolved against the movent, Jacobson v. Maryland Casualty Company, 336 F.2d, 72.

The first test which must be applied to determine the appropriateness of this motion is the comparison of the pleadings including the complaint, the answer, and all affidavits filed herein on behalf of the plaintiff and the defendant in the various stages of this litigation and those which have been filed with the motion of the defendant and with the opposition of the plaintiff.

affirmative defense of absolute privilege, and second, he must appeal to the discretion of this Court that justice dictates that he be given an opportunity to amend his answer approximately one (1) year after the filing thereof. This second condition is not so easily met by the defendant. If he had a defense of absolute immunity, it was available to him at all times mentioned in the complaint. However, he did not plead it as was done in one of the principal cases upon which he relies, Steinberg v. O'Connor, 200 F.Supp.737 (D Conn.1961) and terminate the litigation at its inception, but he elected to defend this action on the merits. He was not concerned, as was Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579 (2 Cir.1949), that he was confronted with the burden of a trial and the inevitable danger of its outcome, but happily he assumed the burden of litigation and took a monumental 942-page deposition of the plaintiff, causing tremendous expenses for transportation, deposition cost, counsel fees, lodging, meals and other incidental expenses, all incurred either or both by himself and the plaintiff, nor did he hesitate to ask for informal discovery through his counsel as is evidenced by their letter of April 28, 1965, attached as Exhibit A hereto, and further, to insure an effective resolution of this claim on the merits, he caused his investigators to travel the length and breadth of this country interviewing witnesses, no less than thirty-three in number, as is evidenced by the letter of Olaf Tammark attached hereto as Exhibit B, but he also exposed himself to 424 interrogatories which he knew, by his counsel, were coming when the same were being prepared. In addition, either gratuitously or perhaps to clear up any lingering doubts about the Answer that he filed, in an affidavit executed by the defendant on January 15, 1965, in support of his Memorandum of Points and Authorities in

Opposition to Plaintiff's Motion that Deposition be Taken on Written Interrogatories, defendant states in paragraph 2 of said affidavit:

> "Incident to my duties on behalf of the Legion of Estonian Liberation, I did, as set forth in my answer to the complaint, say of the plaintiff that I was in possession of responsible information received by me from an official agency of the United States Government to the effect that the plaintiff was a Soviet agent or collaborator and on that account should not receive the cooperation of the Legion and its branches during the plaintiff's tours of the United States. This statement was true."

And then in paragraph 3 under oath, he advises this Court of his very limited resources as a GS-12 in the Bureau of Public Roads, with only a very recent raise from GS-11 effective January 3, 1965. In the memorandum accompanying said affidavit, he states that he possesses no financial resources other than his job and that to make him pay plaintiff's deposition expenses under the circumstances would lack the basic elements of "fair play." He leads this Court to believe that he has extremely limited resources from which to conduct this litigation, and nowhere does he suggest, that in the event that his then subsisting defenses proved to be fictions, he has the majesty of the United States, the money of the C.I.A., and the mockery of absolute privilege hovering on a standby basis, to be thrust upon this Court and the plaintiff in the case of need. Even as late as November 30, 1965, defense counsel in a letter to the Clerk of this Court, requested that the Call of this case be reset, among other reasons, because defendant "plans to take the depositions of many witnesses in this matter. These witnesses live in all parts of the country." (Exhibit C) It is from this posture that the defendant now presents the Court with the novelty of absolute privilege. The defense of absolute privilege, if available, logically presents itself as the first defense to assert,

We shall refer to the following pleadings and documents:

(a) Plaintiff's complaint filed November 6, 1964.

(b) Defendant's answer filed January 3, 1965.

(c) Defendant's affidavit supporting defendant's opposition to motion to permit deposition by written interrogation dated January 15, 1965.

(d) Affidavit of Richard Helms dated December 30, 1965, accompanying defendant's motion for summary judgment.

(e) Affidavit of August Kuklane dated February 17, 1966.

Plaintiff's Complaint	Defendant's Answer
Paragraph 5: "Eerik Heine is a communist and Eerik Heine is a KGB agent."	Page 2 of the defendant's answer, second defense, paragraph 1, ". . . he did say that he was in possession of responsible information received by him from an official agency of the United States to the effect that plaintiff was a Soviet collaborator."
In paragraphs 6 and 7 plaintiff states that the defendant uttered the words "Heine is a KGB agent, he is a communist spy."	Page 2, paragraph 1, second defense, "however, he denies making the statements attributed to him as specified in those paragraphs."

Helms' Affidavit	Raus' Affidavit
"On those occasions specified in paragraphs 5, 6 and 7 of the complaint, the defendant, Juri Raus, was in possession of information furnished to him by the Central Intelligence Agency, and when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States."	Paragraph 2 says that the statements (re: Eerik Heine) were made "incident to my duties on behalf of the Legation of Estonian Liberation. . ."

Helms' Affidavit	Raus' Affidavit
Paragraph 3 states that the defendant Juri Raus was acting "within the scope and course of his employment by the Agency.	Department of Commerce, Washington, D. C. Employed by Bureau of Public Roads.

Answer of Juri Raus	Affidavit of August Kuklane
Page 2, second defense, paragraph 1, the answer of Juri Raus denies making the statements attributed to him as specified in those paragraphs (6 and 7); admits having spoken to one August Kuklane "on an occasion earlier than those specified in paragraphs 6 and 7 of the complaint."	The affidavit of August Kuklane avers that the statements were made on the date specified in the plaintiff's complaint and in essentially the same form as specified in the complaint. He states that ". . . the defendant Juri Raus told your affiant that the plaintiff Eerik Heine was a communist and that the information was given to him by the FBI."

Helms' Affidavit	Defendant's Answer
On those occasions specified in paragraphs 5, 6, and 7 of the complaint. . . "he spoke concerning the plaintiff on such occasions . . . within the scope and course of his employment by the Agency."	The defendant in his defense (7th) said the defendant was privileged to speak of the plaintiff as he did, since the defendant was acting as appropriate officer of the Estonian Liberation Movement.
Paragraph 3 of the affidavit of Richard Helms claims that when the defendant spoke concerning the plaintiff "on those occasions specified in paragraphs 5, 6, and 7 of the complaint" that he was acting within the scope and course of his employment.	In the answer of the defendant, second defense, paragraph 1, page 2, "he denies making the statement attributed to him as specified in those paragraphs." (i.e. paragraphs 6 and 7)

There is a mutual exclusion palpably evident in the juxtaposition of the material averments as set forth above. Most pointedly is the final example placing the denial in the answer vis-a-vis the assertions of the Helms' affidavit. A persisting denial in the defendant's answer of the statements of paragraphs 6 and 7 of the complaint forecloses any attempt to claim that they were made in the course or scope of CIA employment. To peremptorily arrogate course-of-employment privilege in such a case is either grossly careless or incredibly audacious.

3. There is a gross insufficiency inherent in the affidavit supporting the defendant's motion. (Rule 56(e) FRCP)

a. There is a failure to show personal knowledge of the affiant.

Paragraphs 1 and 2 of the said affidavit of Richard Helms claim a familiarization, not a participation, in the events, and the knowledge was received in a manner to which the Court and the plaintiff are not privy. A failure to amply demonstrate such personal knowledge is violative of Rule 56(e) FRCP which requires that supporting and opposing affidavits shall be made on personal knowledge. In Sprague v. Vogt (CCA 8th, 1945) 150 F.2d 795, 800 the Court said:

> When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence and must not only be made on personal knowledge of the affiant but must show the affiant possesses the knowledge asserted.

b. The affiant is not competent to testify at trial.

The thrust of Rule 56(e) is that the affidavit "shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Assuming arguendo, that there was a showing of personal knowledge, and facts rather than conclusions, there must be a showing that the affiant is competent to testify. In Banco de Espana v. Federal Reserve Bank of New York (CCA 2d, 1940) 114 F.2d 438, 445 Judge Clark stated:

> A bona fide affidavit to support a summary judgment must necessarily be a statement of facts which the moving party (sic) knows and is able to substantiate at trial.

In the Banco de Espana case, supra, the affidavit of an ambassador who could, by diplomatic immunity, refuse to appear in Court was not defective barring a showing of such privileged refusal, however the defendant in his memorandum, page 2, paragraph 2 and in

footnote 2 forecloses in cavalier fashion, his own ability to substantiate the statements made in the Helms affidavit by claiming that the affidavit is "without possibility of dispute." Footnote 2 sets forth that the Director of Central Intelligence is directed to protect "intelligence sources and methods from unauthorized disclosure," and under the latter section (50 USCA §403g) the Agency is exempted from the provisions of any law "which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."

The clear implication of these statements is the hanging of a curtain or more appropriately, a cloak, by the CIA, limiting the revelations to those which have been supplied by the affidavit.

Since there can be no expatiation of the conclusory statements of the Helms affidavit, if the restrictive statutes and the Executive Order (No. 10501) are to be followed, the affidavit fails under the requirement of 56(e) "that the affiant is competent to testify to the matters stated therein."

It must be presumed that the defendant has made a full disclosure of the facts. As held in Sexton v. American News Company, D.C. Fed. 1955 133 F. Supp 591 "where evidence is taken in support of motion for summary judgment it is duty of counsel for both parties to fully disclose all evidence bearing on the issue raised by the motion and if on such disclosure, it appears that only one verdict can be rendered, it is the duty of the Court to enter judgment in accordance with the showing mode.

c. The affidavit fails to set forth facts as would be admissible in evidence.

The essential averments of the Helms affidavit, despite the deceptive presumptiousness of their presentation, are as follows:

(a) The CIA participated

(b) There was a communicating of information by CIA

(c) When Raus, the defendant, spoke he was acting within the scope and course of employment of CIA

All three are conclusory statements, opinions of the affiant but not facts in accordance with 56(e). As held in Creel v. Lone Star Defense Corporation (CA 5th, 1949) 171 F.2d 964, 967

> No witness would be permitted to testify that appellee operated as an independent contractor and was in the production of goods for commerce which are the ultimate facts in issue (emphasis supplied).

Statements by Helms in paragraph 2 of the affidavit aver familiarization with that of which there is absolutely no factual basis, "the Central Intelligence Agency's participation in communicating information concerning Eerik Heine to representatives of the Estonian emigre community. . ." (paragraph 2 of the affidavit).

We are presented no facts to show that CIA participated and further it is wholly improper and inefficacious for the affiant to characterize the issuance of defamatory statements as a communication of information of an official nature. In a logic textbook this would appear as a classic example of begging the question, since the affiant assumes as a given fact that there was an official communication when that is an ultimate judgment which must be formed by this Court upon everything presented to it.

The affiant's usurpation of the Court's function is most boldly blatant in paragraph 3 wherein Helms avers summarily that "Juri Raus, . . . was acting within the scope and course of his employment by the Agency. . ."2/ No facts substantiate this

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2/ Scope of employment is a question of fact determinable under the circumstances of a particular case. Torklecka v. Morgan, 125 Ohio St 319, 181 N.E. 450.

conclusion, in fact, the prefatory clause of paragraph 3, "defendant . . . was in possession of information furnished him by CIA," might more readily support the conclusion that there was no directive or even authorization for such statements. Also patently absent is an elucidation as to the information in the defendant's possession.

4. Assuming arguendo, that the defense of absolute privilege were timely filed, and assuming further the defendant had filed a legally sufficient affidavit setting forth facts from which the Court could conclusively find that he was a Federal officer acting within the scope of his employment, nevertheless, plaintiff urges that the defense of absolute privilege is not available to defendant inasmuch as the statements made by defendant come within one of the recognized exceptions to the immunity of a Federal officer, those exceptions being (1) actions by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. Dugan v. Rank (1963), 83 S. Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15. In this case, the actions and statements of the defendant were clearly without the statutory powers of the CIA.[3/]

It cannot be argued that the defendant was performing some function for the Agency under 403(d)(4) or (5), either in collaboration with another intelligence agency or at the direction of

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3/ Under 50 U.S.C.A. §403(d) the CIA is charged to (1) advise (2) recommend (3) correlate, evaluate and disseminate intelligence within the government, and (4) and (5) authorize performance of other services for existing intelligence agencies and as directed by the National Security Council. However, 403(d)(3) provides "That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions." Moreover, the same section (3) limits "appropriate dissemination of such intelligence within the government using where appropriate existing agencies and facilities."

the National Security Council, inasmuch as 403(d)(3) contains a mandate excluding participation of the agency from "internal-security functions." Accordingly, statutory authority for the conduct of the defendant against the plaintiff is non-existent. Defendant argues that Barr granted absolute immunity to a government official in a fairly pedestrian matter and that in this case "of much greater concern to the interests of the United States is the nether world of international conspiracy, espionage and statecraft." (emphasis supplied)

Plaintiff answers that there is clear, explicit statutory authority for each of these nether world activities about which defendant claims concern which has been given to agencies, boards and departments other than the CIA. For example, the Subversive Activities Control Board, created under the Internal Security Act of 1950, a prime purpose of which Act, as stated by Judge Prettyman in Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Board (C.A.D.C. 1963), 331 F.2d 64, 14 L.Ed 46 (remanded for further proceedings on nonconstitutional grounds), was to expose to public knowledge those organizations or individuals who knowingly and wilfully participated in the world Communist movement. The Federal Civil Defense Act of 1950 limits investigations of espionage, sabotage or subversive acts exclusively to the FBI 50 U.S.C.A. 2263. The conspiracy laws are enforced by the Attorney General. Statecraft, as it is characterized by the defendant, is practiced by the Secretary of State 5 U.S.C.A. 151 et seq. and the Foreign Service 22 U.S.C.A. 801 et seq., as amended 1955, 1956, 1960. The entire area about which defendant speaks is well

legislated,4/ so that the only nether land is the area of the defendant's statutory authority to slander plaintiff. Defendant has the affirmative burden to establish statutory authority before he can claim official immunity, and which in Maryland he must establish by a preponderance of the evidence. Wetherby v. Retail Credit Co. 201 A2d 344, 235 Md. 237 (as to burden).

Therefore, until defendant makes a showing by a preponderance of the evidence that he had statutory authority, the defense of absolute privilege and summary judgment are not available to him.

5. If the records show that genuine issues of fact exist and that the evidence on those issues is conflicting, of uncertain weight, in part incompetent, and itself susceptible of various interpretations, only by a trial can the Court ascertain the pertinent facts and move to decide such questions of substantive law as those facts present. In such a situation the entry of summary judgment is not the proper method. American Securit Company v. Hamilton Glass Company 254 F.2d 889, 892. Also to be considered is the fact that the affidavit, the inherently defective slender reed upon which the motion rests, is uncomplemented by other valid evidence of affidavit or documentary form. Nothing sets forth with decisiveness or clarity the elements of fact upon which the Court can make a determination of the vital central issue upon which the motion depends. Nothing states the dates of the

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4/ Internal Security Act of 1950, 50 U.S.C.A. §§781-790
Communist Control Act of 1954, 50 U.S.C.A. §841 et seq.
Smith Act, 18 U.S.C.A. 2385
Foreign Agents and Propaganda 22 U.S.C.A. 601 et seq.
Subversive Activities Control Board, 50 U.S.C.A. §§791-793
Registration of Certain Persons Trained in Foreign Espionage, 50 U.S.C.A. §§851-858
Espionage and Censorship, 18 U.S.C.A. §§ 791-797
Federal Bureau of Investigation (Espionage, sabotage or subversive acts, investigation by 5 U.S.C.A. §341(c))
Foreign Relations 18 U.S.C.A. §§951 et seq.
Conspiracy, 18 U.S.C.A. 371
Sabotage, 18 U.S.C.A. 2151
Treason, Sedition and Subversive Activities, 18 U.S.C.A. 2381
National Security Agency

defendant's employment with Central Intelligence Agency, his position, his supervisor's name and title, the employees under his supervision, if any, the nature of his mission at the time of the utterance of the defamatory statements, the person and the position of the person who ordered the defamatory statements made against the plaintiff or the purpose of such character assassination of the plaintiff, a person well known in the Estonian communities of Canada and the United States as a militant anti-Communist on this continent and in Europe. The defendant's claim of privilege under official scope of employment is unbuttressed by the information which is presented and questions such as "outer perimeter" cannot even be considered. Nothing is said as to whether the defendant's position vested him with authority and discretion to defame others and no legislative or executive orders are cited demonstrating under what authority the organization for which defendant Juri Raus was allegedly employed, is authorized to issue maledictions in a course of its duties.

6. It is premature to determine whether a privilege exists for statements communicated in the course of employment under state court rulings or whether this is a Federal question until there has been a showing of facts upon which there can be no dispute that the defendant was acting within the scope of his employment. This once again illustrates that the defendant in his motion is premature and presumptuous in his claim.

7. Kelley v. Dunne, 344 F.2d 129 (1965) in discussing the principle established by the Barr v. Mateo and Howard v. Lyons decisions notes certain common denominators which are present in all cases where the privilege is held to exist. At page 132 it states that in the first place the conduct of the defendants in all cases viewed without reference to the defendant's alleged

motives, was within the normal scope of their agency powers. A second common denominator is that the activity of the defendant was prima facie in accordance with his duties and customary behavior. Further this decision states that while no act can ever be judged in vacuo but only with some measure of reference to external circumstances, some actions require very little showing in order to appear at least prima facie justified, while others need elaborate support. Paradoxically it would seem that it is in the latter situation that there is less need for the immunity doctrine. In the latter case where an officer knows that he is acting out of the ordinary, he is on notice of the circumstances, and there is more reason for him to have to expect to be prepared to justify his conduct. This is far less of a burden than if he had to be constantly on guard in every routine case of customary activity.

Thirdly, since the doctrine of absolute immunity is based upon the relative importance of the public, as against a private, interest, application of the doctrine must vary with the relative weight of the competing interests. In the cases in which private rights have been foreclosed, free exercise of the public function has been considered highly important.

8. The plaintiff believes that he has amply demonstrated the invalidity of the affidavit upon which the motion is totally dependent and the consequent impropriety of the defendant's position in its motion for summary judgment. To be considered however is the fact that the plaintiff has submitted interrogatories to the defendant, granted lengthy extensions of time to counsel for the defendant in order that those interrogatories could be answered and have subsequently been met with a motion to strike filed synchronously with the motion for summary judgment.

Plaintiff thus is without information to further justify his opposition to the motion and notes this inability in order that he may avail himself of the provisions of 56(f) FRCP.

For the foregoing reasons, plaintiff respectfully moves the Court to deny defendant's motion for summary judgment.

/s/
Ernest C. Raskauskas
1418 Ray Road
Hyattsville, Maryland
Area Code 202 296-4272

/s/
Robert J. Stanford
10401 Grosvenor Place
Rockville, Maryland
Area Code 202 296-8870

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Opposition was personally served on Paul R. Connolly, Esquire, and E. Barrett Prettyman, Jr., Esquire, Attorneys for Defendant, to their office address at 815 Connecticut Avenue, N.W., Washington, D.C. 20006, this 23rd day of February, 1966.

/s/
Ernest C. Raskauskas

Next 5 Page(s) In Document Exempt

Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,	)	
Plaintiff	)	
v.	)	Civil Action No. 15952
JURI RAUS,	)	
Defendant	)	

AFFIDAVIT

August Kuklane, 4714 South Thomas Avenue, Baltimore, Maryland, 21206, being first duly sworn, deposes and says: That he is personally acquainted with both the plaintiff and the defendant in the above-captioned matter; that he has familiarized himself with the allegations contained in the Complaint in the above-entitled case; that on or about July 4, 1964, he was at an Estonian gathering at Laurel Acres, Pasadena, Maryland, the defendant, Juri Raus, told your affiant that the plaintiff, Eerik Heine, was a Communist, a Communist agent, and a KGB agent, and said Juri Raus further stated that this information was given to him by the F.B.I., Federal Bureau of Investigation; on or about September 4, 1964, at an Estonian gathering at Estonian House, 1932 Belair Road, Baltimore, Maryland, at a reception in honor of Estonian Colonel Alfons Rebane, the defendant, Juri Raus, repeated to your affiant, the same allegations that he made on July 4, 1964, and he again stated that the source of this information was the Federal Bureau of Investigation, and he stated no other source for said information.

Hugh D Duncan

August Kuklane

JRD, SKEENS &
RASKAUSKAS
ATTORNEYS AT LAW
[illegible] STREET, N. W.
[illegible]INGTON, D. C. 20006
296-[illegible]

STATE OF MARYLAND)
) ss
COUNTY OF)

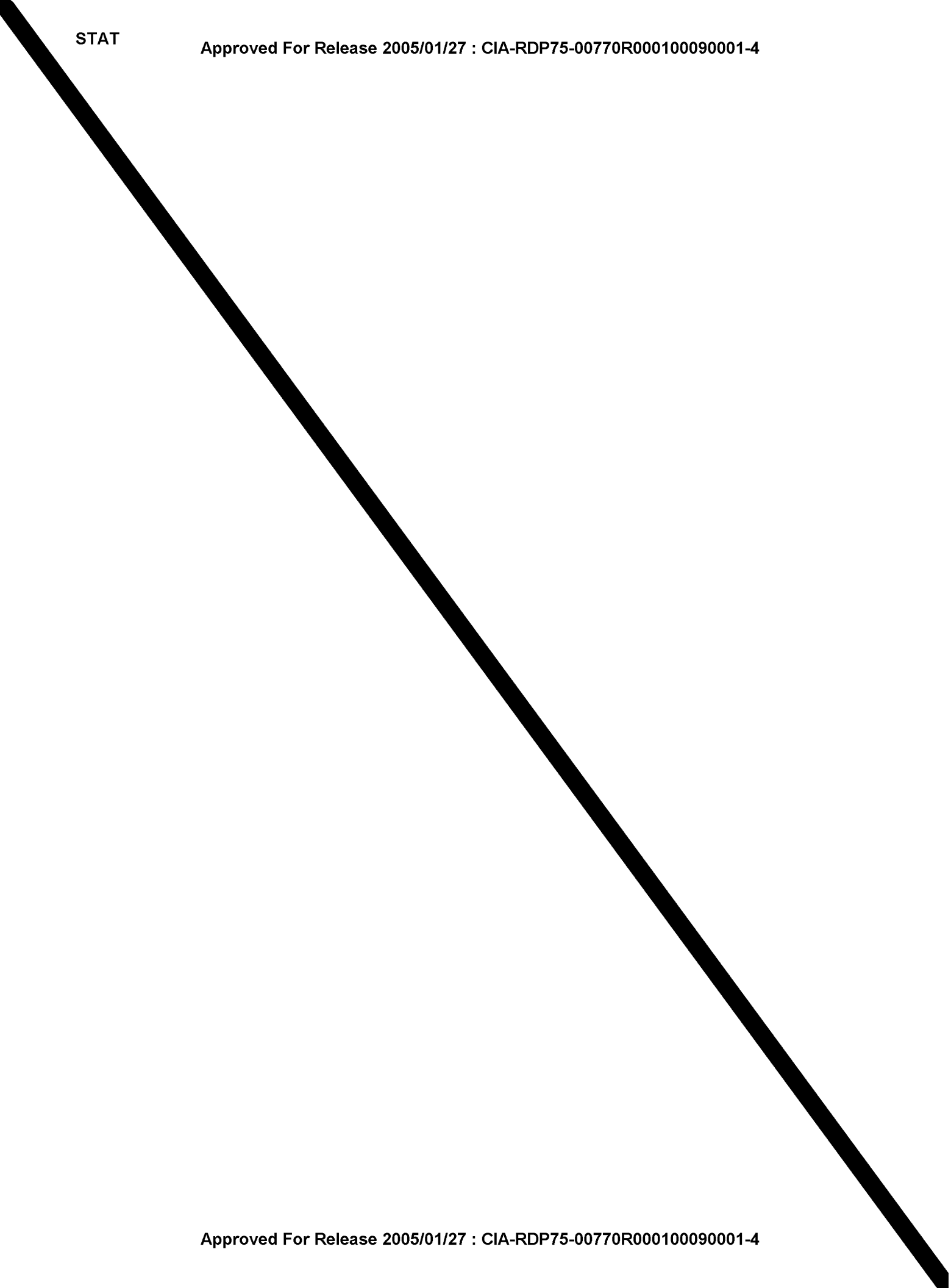
Subscribed and sworn to before me this 17th day of February, 1966.

Notary Public

(SEAL)

My commission expires April 1, 1969.

FOLEY, SKEENS & SKAUSKAS
ATTORNEYS AT LAW



Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE
121 Mount Olive Drive
Rexdale, Ontario
Canada

Plaintiff

vs.

Civil Action No. 15952

JURI RAUS
5103 43rd Avenue
Hyattsville, Maryland
United States of America

Defendant

MOTION THAT DEPOSITION BE TAKEN ON WRITTEN INTERROGATORIES, OR IN ALTERNATIVE, THAT DEFENDANT BE ORDERED TO PAY PLAINTIFFS TRAVEL AND LODGING EXPENSES FOR ORAL DEPOSITION.

Plaintiff moves the court for an order that the deposition of plaintiff, notice of the taking of which on oral examination was served by defendant on plaintiff's counsel on January 6, 1965, be taken only on written interrogatories, on the ground that the plaintiff resides in Rexdale, Ontario, Canada, more than five hundred miles from the District of Columbia; that plaintiff cannot afford the expense of travelling from Rexdale, Ontario, Canada to the District of Columbia, loosing time from his employment, and lodging in the District of Columbia for two days, inasmuch as he is a workman receiving a subsistence income; and, that the matters concerning which the plaintiff will be examined are comparatively simple and can be inquired into effectively by written interrogatories.

In the alternative, plaintiff moves the court that if oral examination be permitted, defendant be required to advance plaintiff the expenses of travelling to the District of Columbia by plane and further that the defendant be required to pay plaintiff's lodging in the District of Columbia for two nights together with his meals for two days.

Ernest C. Raskauskas, Esquire
1418 Ray Road
Hyattsville, Maryland
202-296-4272
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was by me mailed, postage prepaid, this 15th day of January, 1965, to Paul R. Connolly, and E. Barrett Prettyman,Jr., Attorneys for Defendant, to their office address at 800 Colorado Building, Washington, D.C.

Ernest C. Raskauskas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HERIK HEINE	)	
Plaintiff	)	
v.	)	Civil Action No. 15952
JURI RAUS	)	
Defendant	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION THAT DEPOSITION BE TAKEN ON WRITTEN INTERROGATORIES, OR IN ALTERNATIVE, THAT DEFENDANT BE ORDERED TO PAY PLAINTIFF'S TRAVEL AND LODGING EXPENSES FOR ORAL DEPOSITION

The plaintiff's action seeks Ten Thousand Dollars ($10,000) compensatory damages and One Hundred Thousand Dollars ($100,000) punitive damages from the defendant on account of three alleged slanders spoken of the plaintiff between November 9, 1963 and September 4, 1964. The defendant has answered that, incident to his duties as National Commander of the Legion of Estonian Liberation, he did say of the plaintiff that the defendant was in possession of responsible information received by him from an official agency of the United States Government to the effect that the plaintiff was a Soviet agent or collaborator, and on that account, should not receive the cooperation of the Legion and its branches during the plaintiff's tours of the United States. The defendant has further asserted that this statement was true. The plaintiff, on the other hand, alleges, inter alia, that he has lectured in this country on his experiences "as a prisoner in Russian prison camps and on his personal Guerilla fighter activities in Occupied Estonia," and that his reputation in the Estonian community has been damaged by the defendant's alleged statements.

It is at once apparent from the breadth and scope of the activities involved that written interrogatories are an inadequate substitute for an oral deposition. The plaintiff's assertion that ". . . the matters concerning which the plaintiff will be examined are comparatively simple and can

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be inquired into effectively by written interrogatories" cannot withstand analysis.

The scope of relevancy in a defamation action is as broad as any matter litigated before the courts. Since the thrust of a defamation action is damage to a reputation, the entire personal history of the plaintiff is fair ground for discovery. Likewise, when punitive damages are sought, and malice is charged of the defendant, motivations which may spring from long associations and hidden memories may likewise be appropriate subjects for discovery. These matters cannot be explored on written interrogatories because it is impossible to anticipate the answers which may be forthcoming to the various courses of inquiry which may be opened.

In the present case, these considerations apply with even greater force. The plaintiff's history as an alleged Soviet prisoner and as an alleged guerilla freedom fighter will have to be explored. Since all of this activity supposedly occurred behind the Iron Curtain, there are not available to the defendant documents or other public sources of knowledge against which to verify the plaintiff's answers. The nature of plaintiff's lecturing activities; his relationship to various Estonian organizations and movements, and his reputation "amongst members of the Estonian community" are all proper areas of discovery. The plaintiff's deposition must, therefore, be wide-ranging, and the truth or falsity of the plaintiff's story must largely depend upon its inherent character.

" Even in the ordinary action, it is generally held that oral interrogation is much to be preferred over written interrogatories. In V. O. Machinelmport v. Clark Equipment Co., 11 F.R.D. 55, 58 (S.D.N.Y. 1951), the Court said: "Under ordinary circumstances, the advantages of oral examination over the rigidity of written interrogatories are readily acknowledged. Cross-examination of a witness who may be evasive, recalcitrant or non-responsive to questions is an essential in ferreting out facts, particularly of an adverse party or witness."

The present deposition is of the adverse party. It is not one taken to establish some routine and not readily evaded fact. It is

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intended to be a searching inquiry of the plaintiff. For this reason, written interrogatories are an inadequate substitute for an oral examination.

The plaintiff suggests, as an alternative, that his travel and lodging expenses for the taking of his deposition be paid by the defendant. The grounds which he asserts for this unusual request are that he cannot afford the cost of travel from Rexdale, Ontario, to Washington, D. C., "inasmuch as he is a workman receiving a subsistence income." This assertion of fact in his motion is not supported by affidavit and is not adequately detailed in order to permit the Court to make an intelligent judgment with respect to it. The Court is not told the amount of his income from his job, or any other fact concerning the financial condition of the plaintiff. He simply suggests that the defendant pay for the privilege of having been sued in the District of Maryland to the extent of underwriting the plaintiff's costs of litigation. The Court is not told any facts at all with respect to the existence of any other source of income of the plaintiff or of his total financial worth. These are relevant considerations. See Irwin Co. v. Tide Publishing Co., 13 F.R.D. 10 (S.D.N.Y. 1952). And, indeed, the bare assertion by the plaintiff in his moving papers that "he is a workman receiving a subsistence income" would seem to conflict with his assertions in paragraph 4 of the complaint that he "partially earned his livelihood and acquired certain sums of money" from lecturing and from the exhibiting of a motion picture "attended by thousands and thousands of persons of Estonian extraction."

There is, moreover, no assertion by the plaintiff, as there has been in some cases, that his job would be jeopardized by the time which he would be required to take to journey to Washington, D. C., to give his deposition. He is probably unable to make such an assertion in view of the frequency with which he has heretofore come to the United States, as disclosed in his complaint and the defendant's affidavit, which is attached hereto and incorporated herein.

It is a well-established general rule that a plaintiff must make himself available for the taking of his oral deposition in the forum which

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he himself has chosen. Pierce v. Forsyth Lobeke, 21 F.R.D. 195, 198 (S.D.N.Y. 1957). In Irwin Co. v. Tide Publishing Co., supra at 18, the Court stated the usual rule to be that "a plaintiff, having selected a forum, must be prepared to bear the necessary costs of prosecuting his claim, and, therefore, should submit to examination at his own expense in the forum he has chosen." Accord: Zwirlein v. Slade Lacon Inc., 11 F.R.D. 202 (S.D. N.Y. 1954); Montgomery v. Sheldon, 16 F.R.D. 24 (S.D.N.Y. 1954); 2A Barron & Holtzoff, Federal Practice and Procedure (1961) § 713 at pp. 212-213.

As disclosed by the defendant's affidavit, he is a Government employee attempting to raise and maintain a family upon a modest income. He possesses no financial resources other than his job. He carries several current debts. Under these circumstances, a ruling which would permit the defendant to be sued in this District but which would then either require him to prepare his defenses at his own expense, far removed from this District and outside the United States, or to support the plaintiff at the forum, would lack basic elements of fair play.

Whatever hardship or burden may be imposed upon the plaintiff--and the existence of these cannot be determined on the basis of his moving papers--must be weighed against the defendant's need adequately to prepare his defense and to avail himself of the discovery prerogatives which the Federal Rules of Civil Procedure accord to him.

Respectfully submitted,

By /s/
Paul R. Connolly
5411 Albemarle Street
Bethesda, Maryland

By /s/
E. Barrett Prettyman
600 Colorado Building
Washington 5, D. C.

Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Points and Authorities in Opposition to Plaintiff's Motion that Deposition be Taken on Written Interrogatories, or in Alternative, that Defendant be Ordered to Pay Plaintiff's Travel and Lodging Expenses for Oral Deposition and attached Affidavit was mailed, postage prepaid, this 18th day of January, 1965, to Ernest C. Raohauskas, Esq., 1418 Ray Road, Hyattsville, Maryland, Attorney for Plaintiff.

/s/
Paul R. Connolly
Attorney for Defendant

HOGAN & HARTSON
COLORADO BUILDING
WASHINGTON, D. C. 20005

Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE)

Plaintiff)

v.) Civil Action No. 15952

JURI RAUS)

Defendant)

STIPULATION

It is stipulated by and between the parties to this action, through their attorneys, that:

(1) The date heretofor set for the taking of plaintiff's deposition is hereby changed from February 2, 1965, to 10:00 a.m., Saturday, February 27, 1965, in the offices of Hogan & Hartson, 800 Colorado Building, Washington 5, D.C.;

(2) The plaintiff hereby voluntarily withdraws his "Motion That Deposition Be Taken on Written Interrogatories, Or in Alternative, That Defendant Be Ordered to Pay Plaintiff's Travel and Lodging Expenses for Oral Deposition," filed in this Court on January 13, 1965; and

(3) The plaintiff consents to the taking of his deposition by the defendant on February 27, 1965.

By signed
Ernest C. Raskauskas
1418 Ray Road
Hyattsville, Maryland

Attorney for Plaintiff

By signed
Paul R. Connolly
5411 Albemarle Street
Bethesda, Maryland

By signed
E. Barrett Prettyman, Jr.
800 Colorado Building
Washington 5, D. C.

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 15952
	*	
JURI RAUS,	*	
	*	
Defendant.	*	

PRAECIPE

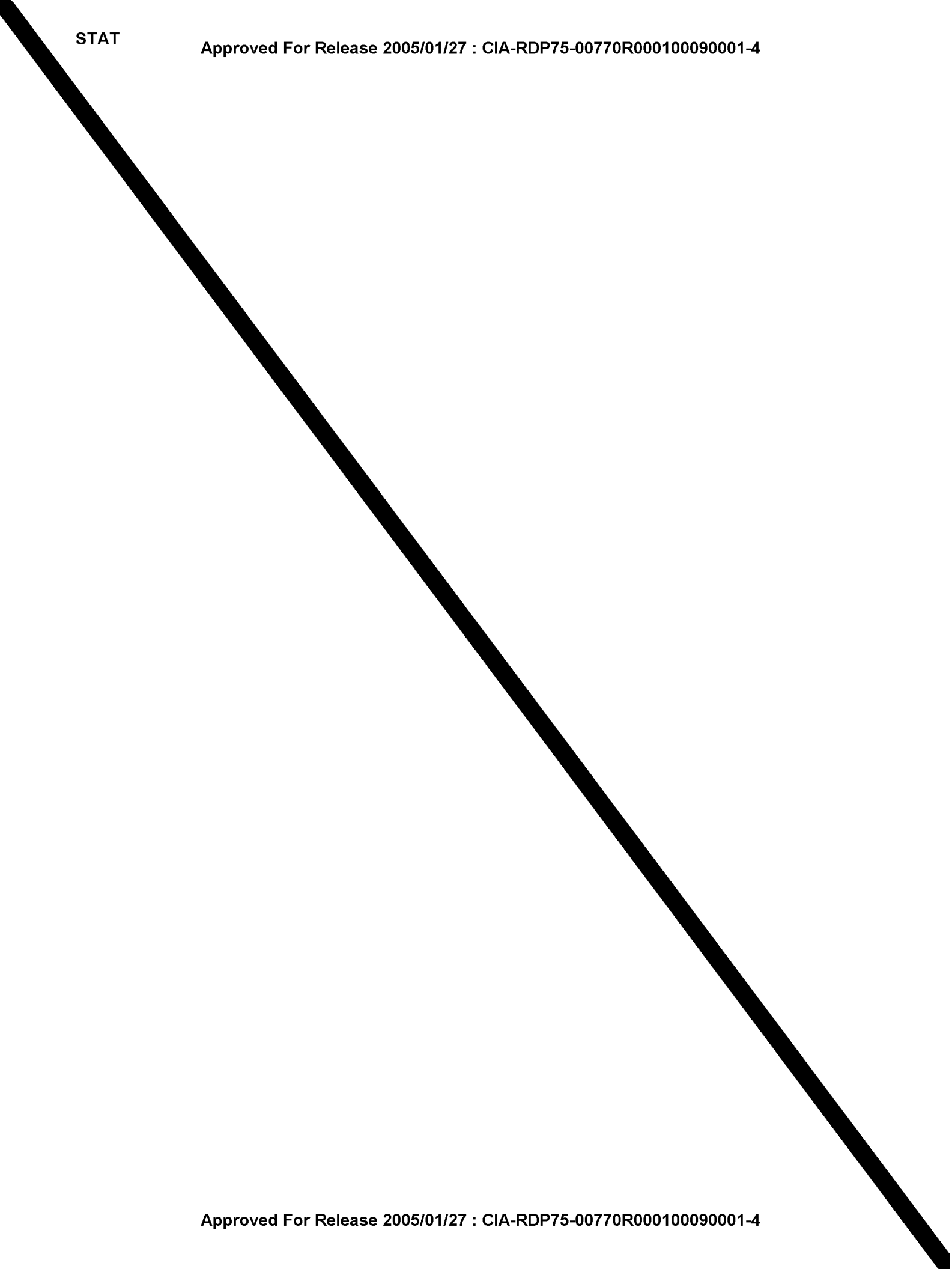
The Clerk of the Court will please enter the appearance of Robert J. Stanford, Esq., 1730 M Street, N.W., Washington, D.C., as co-counsel in the above styled cause.

Ernest C. Raskauskas
Attorney for Plaintiff
1418 Ray Road
Hyattsville, Maryland

Robert J. Stanford
1730 M Street, N.W.
Washington, D.C.

CERTIFICATE OF SERVICE:

I copy of the foregoing Praecipe was personally served by the undersigned on Paul R. Connolly and E. Barrett Prettyman, Jr., Attorneys for Defendant, at 800 Colorado Building, Washington, D.C., this 27th day of February, 1965.



Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	)	
Plaintiff	)	
v.	)	Civil Action No. 15,952
JURI RAUS	)	
Defendant	)	

MOTION TO STRIKE INTERROGATORIES

Comes now the Defendant by his attorneys and moves the Court, pursuant to Rule 30(b), F.R.C.P., to strike the Plaintiff's interrogatories to the Defendant upon the following grounds:

(1) Four Hundred and Twenty-four interrogatories spread over seventy-one pages constitutes an inordinate number of interrogatories so that they may be said to be oppressive.

(2) The very prolific and repetitive character suggests, if it does not require, that Plaintiff's interrogation take place upon an oral deposition.

(3) A great number of the questions inquire of privileged matter and 325 are obviously objectionable on their face.

(4) In view of the claim of absolute privilege made by the Defendant in a Motion for Summary Judgment filed contemporaneously herewith the Defendant's answers to the interrogatories, if permitted, would be immaterial.

/s/ PAUL R. CONNOLLY

Paul R. Connolly
5411 Albemarle Street, N.W.
Westmoreland Hills
Washington 16, D. C. OL 2-5851

/s/

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland OL 6-7289

Of Counsel:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Defendant

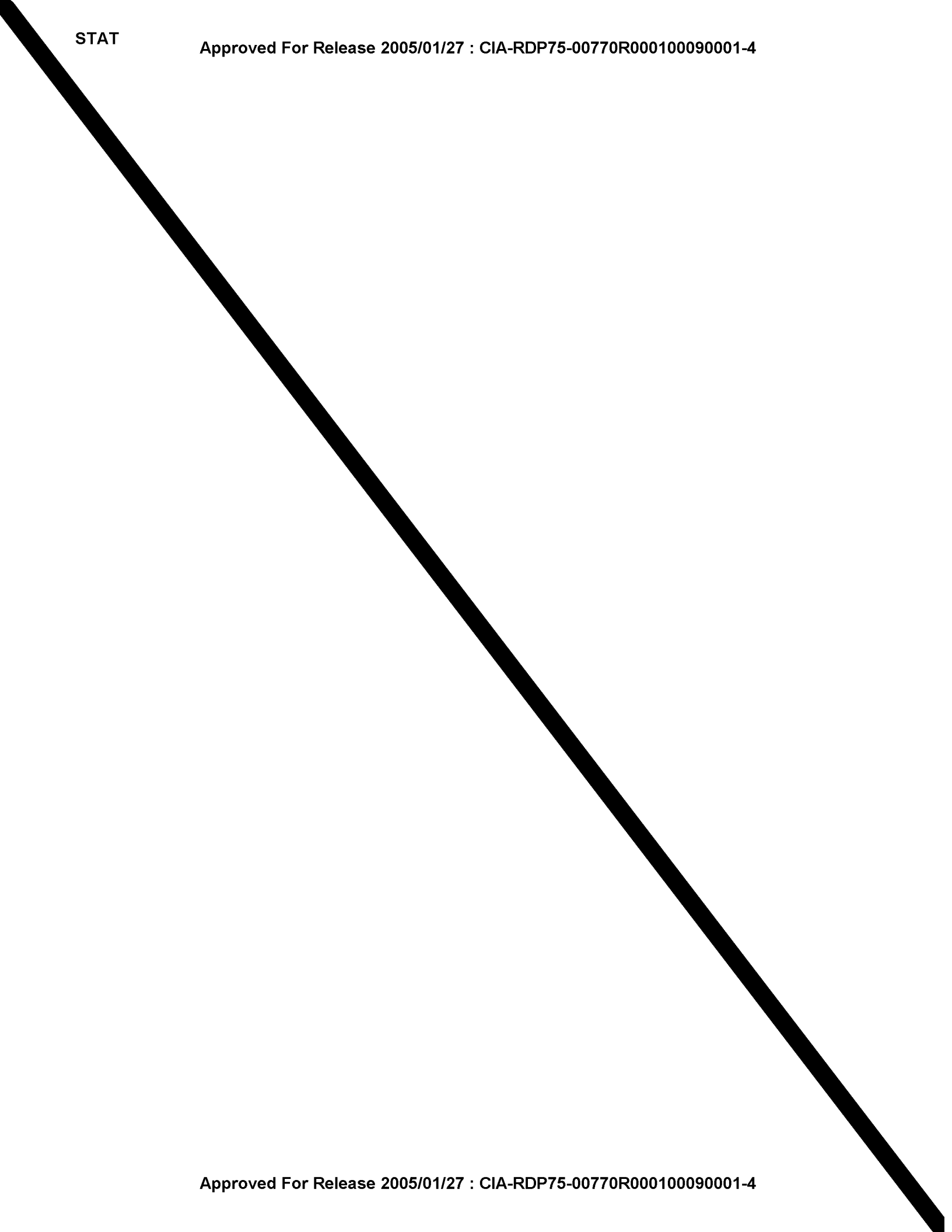
CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Summary Judgment, attached Exhibit A, Supporting Memorandum of Points and Authorities, and Motion to Strike Interrogatories was mailed this 11th day of January, 1966, to Ernest C. Raskaukas, Esquire, 1418 Ray Road, Hyattsville, Maryland, and Robert J. Stamford, Esquire, 1730 M. Street, N.W., Washington, D. C., Attorneys for Plaintiff.

/s/ PAUL R. CONNOLLY

Paul R. Connolly

HOGAN & HARTSON
815 CONNECTICUT AVENUE
WASHINGTON, D. C. 20006



Approved For Release 2005/01/27 : CIA-RDP75-00770R000100090001-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	)	
Plaintiff	)	
v.	)	Civil Action No. 15,952
JURI RAUS	)	
Defendant	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant by his attorneys and moves the Court, pursuant to Rule 56, F.R.C.P., for a summary judgment in his favor and for reason therefor says that upon the basis of the affidavit of Richard Helms, Deputy Director of Central Intelligence, attached hereto and incorporated by reference as Exhibit A, the Defendant is entitled to judgment as a matter of law and there is not, nor can there be, any genuine issue of material fact, as more fully appears from the memorandum of points and authorities attached hereto.

PAUL R. CONNOLLY

Paul R. Connolly
5411 Albemarle Street, N.W.
Westmoreland Hills
Washington 16, D. C.
OL 2-5851

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland
OL 6-7289

Of Counsel:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIK HEINE	)	
Plaintiff	)	
v.	)	Civil Action No. 15,952
JURI RAUS	)	
Defendant	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The complaint charges that the defendant committed three separate acts of defamation against the plaintiff. It alleges that on November 9, 1963, at a special meeting of the Board of the Legion of Estonian Liberation in New York, the defendant said of the plaintiff that he "is a Communist" and "a KGB Agent," the latter intending to refer to the plaintiff as a Communist secret agent (Par. 5); that on July 4, 1964, "at an Estonian gathering at Laurel Acres, Pasedena, Maryland," the defendant spoke to one August Kuklane, again saying that the plaintiff was a Communist and a Communist agent (Par. 6); and that on September 4, 1964, "at an Estonian gathering at Estonian House, 1932 Belair Road, Baltimore, Maryland, at a reception in honor of Estonian Colonel Alfons Rebane," the defendant again said to August Kuklane of the plaintiff that he was a Communist and a Communist agent (Par. 7).

The complaint also alleges (Par. 9) that the defendant "is a person of apparent responsibility whose position in life and whose position in various Estonian organizations 1/ is calculated to give credit to the utterances and charges" made concerning the plaintiff.

The answer admits (Second Defense) that the defendant did say that "he was in possession of responsible information received by him from an

1/ The answer admits that the defendant at all material times was "the National Commander of the Legion of Estonian Liberation, Inc." (Second Defense)

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WASHINGTON, D. C. 20006

official agency of the United States Government to the effect that the plaintiff was a Soviet agent or collaborator and on that account should not receive the cooperation of the Legion and its branches during the plaintiff's tours of the United States."

The Fourth Defense in the answer raised the claim of privilege and asserted that the defendant spoke of the plaintiff in furtherance of his legitimate duties. However, the affidavit of the Deputy Director of Central Intelligence,[2/] without possibility of dispute, now informs the Court that, on those occasions on which the defendant spoke of the plaintiff, the defendant "was in possession of information furnished to him by the Central Intelligence Agency" and "on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States."

Under these circumstances, there arises in favor of the defendant an absolute privilege which precludes, even under a showing of actual malice,[3/] any possibility of recovery by the plaintiff. As a matter of law, the defendant is entitled to judgment.

The matter is to be determined without regard to the rules of privilege under state law.[4/] The question calls solely for the application of federal standards. In Howard v. Lyons, 360 U.S. 593, 597 (1959), the Supreme Court, in enunciating a rule of absolute privilege applicable to lower ranks of federal employees (in that case, the commander of the Boston Naval shipyard), said:

2/ Under both 61 Stat. 497, as amended, 50 U.S.C.A. §403(d)(3) and 63 Stat. 211, 50 U.S.C.A. §403g, the Director of Central Intelligence is directed to protect "intelligence sources and methods from unauthorized disclosure," and under the latter section, the Agency is exempted from the provisions of any law "which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." See also Executive Order No. 10501, Nov. 9, 1958, 18 F.R. 7049, as amended, 50 U.S.C.A. following §401 (1965 Cum. Supp.)

3/ Which, of course, the defendant denies. (Fourth Defense)

4/ E.g., Maryland in the development of its own law of privilege "has shown reluctance to extend absolute privilege" to any but very senior state officers. See Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962).

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WASHINGTON, D. C. 20006

> At the outset, we take note of a question which the Court of Appeals, on its view of the case, did not find it necessary to resolve -- whether the extent of the privilege in respect of civil liability for statements allegedly defamatory under state law which may be claimed by officers of the Federal Government, acting in the course of their duties, is a question as to which the federal courts are bound to follow state law. We think that the very statement of the question dictates a negative answer. The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several states. Cf. Clearfield Trust Co. v. United States, 318 U.S. 363. We hold that the validity of petitioner's claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress.

The rule of absolute privilege is now a fixture of federal law applicable to defamatory statements made by all federal officers of any rank the "outer perimeter" of whose duties authorize them to speak or write of another or who speak or write defamatory matter in the discharge of their official duties. The matter has now been settled by Barr v. Matteo, 360 U. S. 564 (1950), and Howard v. Lyons, supra, both decided the same day, and followed in Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960);[5/] Sauber v. Gliedman, 283 F.2d 941 (7th Cir. 1960), cert. denied, 366 U.S. 906 (1961);[6/] Cve Gustavsson Contracting Co. v. Floete, 299 F.2d 655 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963);[7/] Poss v. Lieberman, 299 F.2d 358 (2d Cir. 1962),

---

5/ Libel suits dismissed (on grounds of absolute privilege) against civil service employees at a Naval Air Technical Training Center who made written statements to various investigators for a grievance committee about other civil service employees.

6/ Action for malicious defamation dismissed (on grounds of absolute privilege) against a Special Assistant to the Attorney General who made the statements at a press conference about corruption on the part of the former District Director of Internal Revenue in Chicago.

7/ Tort action brought by a corporation for false and malicious statements in an internal report by the Administrator of GSA, the Government contracting officer, and his assistant. Dismissed on grounds of absolute immunity.

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WASHINGTON, D. C. 20006

cert. denied, 370 U.S. 944 (1962);[8] Brownfield v. Landon, 113 U.S. App. D.C. 248, 307 F.2d 389, cert. denied, 371 U.S. 924 (1962);[9] Mozencraft v. Captiva, 314 F.2d 288 (5th Cir. 1963);[10] Denman v. White, 316 F.2d 524 (1st Cir. 1963);[11] and Waymire v. Deneve, 333 F.2d 149 (5th Cir. 1964).[12]

The doctrine of absolute privilege to speak or write in a defamatory manner of any person has long been recognized to reside in federal officers of Cabinet rank. E.g., Spalding v. Vilas, 161 U.S. 483 (1896). In both the Barr and Howard cases the Supreme Court considered whether this doctrine should be extended to "officers of lower rank in the executive hierachy."[13] The Supreme Court said in the Barr case, 360 U.S. at 572-573:

> We do not think that the principle announced in Vilas can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts [citing cases]. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.*** It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted -- the relation of the act complained of to "matters committed by law to his control or supervision,"*** which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officers with immunity from civil defamation suits.

8/ Absolute immunity accorded a claims representative of HEW who said (erroneously) in an internal memo that the plaintiff, whose wife was claiming Social Security, had been disbarred from law practice.

9/ Suit for slander dismissed (on grounds of absolute immunity) against the Inspector General of the Air Force for statements made at a conference with a congressman, businessmen and Air Force officers.

10/ Libel action by an employee of the Department of Interior, Fish and Wildlife Service, Bureau of Commercial Fisheries, against his superior based on an internal report was dismissed on grounds of absolute privilege.

11/ The Court held absolutely privileged an Air Force officer's charge to the press that the plaintiff was irresponsible and had distorted the facts in stating that Texas Tower 4 had been unsafe for many years.

12/ Defamation action dismissed on grounds of absolute privilege where a Bureau of Customs agent made statements during an investigation of plaintiff, who had allegedly imported liquor illegally.

13/ Barr v. Matteo, supra, 360 U.S. at 573.

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WASHINGTON, D. C. 20006

The affidavit of the Deputy Director of Central Intelligence informs the Court that the defendant was charged with the duty of speaking of the plaintiff; that he spoke with information furnished him by the Central Intelligence Agency, and that in so speaking the defendant was engaged in the performance of his duties and in the course of his employment by and on behalf of the United States. Therefore, despite the plaintiff's allegations of malice, the defendant is totally immune from an action for damages for defamation.

In particular circumstances, the rule may seem harsh, that a person may defame another with impunity, but the reason for the doctrine has been "admirably expressed", in the words of the Supreme Court, by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950):[14/]

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

This was written of and applied in Barr and Howard to fairly pedestrian matters. Of much greater concern to the interests of the United States is the nether world of international conspiracy, espionage and statecraft.

14/ Barr v. Matteo, supra, 360 U.S. at 571.

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WASHINGTON, D. C. 20006

The importance to the United States of these matters and the necessity of keeping them from judicial and other public inquiry are best illustrated by the language of the statute which created the Central Intelligence Agency, 61 Stat. 497, as amended, 50 U.S.C.A. §§402, 403, which established a National Security Council "to advise the President with respect to the integration of domestic, foreign and military policies relating to the national security;" committed to the Council the duty "to assess and appraise the objectives, commitments and risks of the United States in relation to our actual and potential military power," and established under the Council's jurisdiction the Central Intelligence Agency "for the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security."

The effectiveness of this agency in dealing with national security matters obviously requires that the principle of Barr and Howard be applied even more stringently than in the ordinary affairs of the civil administration of government.

In Steinberg v. O'Connor, 200 F.Supp. 737 (D. Conn. 1961), the Administrator of the Bureau of Security and Consular Affairs of the Department of State in an address to a gathering of the Veterans of Foreign Wars spoke of the issuance of passports to persons "who had a record of activity in support of the international communist movement." He referred to such persons as enemies of the United States, and the record made in the case showed that the plaintiff was sufficiently identified as a subject of the Administrator's remarks. When sued for damages for defamation, the Administrator pleaded absolute privilege, which the court upheld upon the theory of Barr and Howard. The court concluded that "The public statement in the address before the VFW concerned the business of his office and dealt with a matter of almost universal public interest." 200 F.Supp. at 739.

The same result should follow in the present case, where it clearly appears that the defendant in speaking of the plaintiff was dis-

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WASHINGTON, D. C. 20006

charging duties imposed upon him by his office and was speaking in the interest and on behalf of the United States.

Respectfully submitted,

Paul R. Connolly
5411 Albemarle Street, N. W.
Westmoreland Hills
Washington 16, D. C.
OL 2-5851

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland
OL 6-7289

Attorneys for Defendant

Of Counsel:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	)	
Plaintiff	)	
v.	)	Civil Action No. 15,952
JURI RAUS	)	
Defendant	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant by his attorneys and moves the Court, pursuant to Rule 56, F.R.C.P., for a summary judgment in his favor and for reason therefor says that upon the basis of the affidavit of Richard Helms, Deputy Director of Central Intelligence, attached hereto and incorporated by reference as Exhibit A, the Defendant is entitled to judgment as a matter of law and there is not, nor can there be, any genuine issue of material fact, as more fully appears from the memorandum of points and authorities attached hereto.

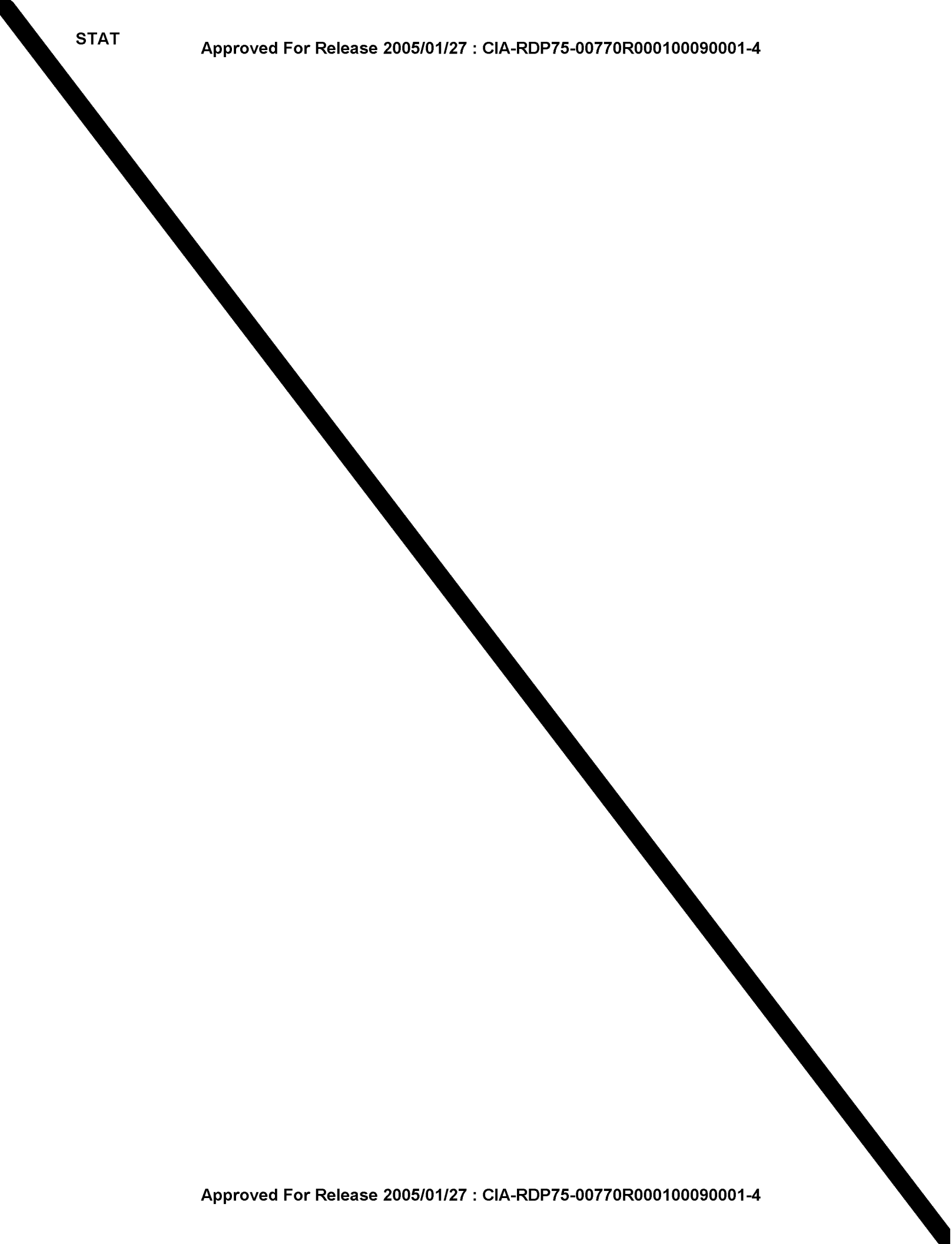
PAUL R. CONNOLLY

Paul R. Connolly
5411 Albemarle Street, N.W.
Westmoreland Hills
Washington 16, D. C.
OL 2-5851

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland
OL 6-7289

Of Counsel:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006



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1633
IN EXCESS OF
1000 QUESTIONS

DES MARKINGS
INDICATES ON
PAUL'S COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIK HEINE	)	
Plaintiff	)	
v.	)	Civil Action No. 15952
JURI RAUS	)	
Defendant	)	

INTERROGATORIES TO DEFENDANT

TO: JURI RAUS
c/o E. Barrett Prettyman, Esquire
Hogan & Hartson
Attorneys for Defendant
815 Connecticut Avenue, N.W.
Washington, D.C.

Plaintiff requests that the defendant Juri Raus, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following Interrogatories:

a. These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where the name or identity of a person is requested, please state the full name, home address, and also the business address, if known.

c. Unless otherwise indicated, these Interrogatories refer to the time, place and circumstances of the occurrences mentioned or complained of in the pleadings.

d. Where knowledge or information or possession of a party is requested, such request includes knowledge of the party's agents, representatives and, unless privileged, his attorney.

e. The pronoun "you" refers to the party to whom these Interrogatories are addressed, and the persons mentioned in clause (d).

Next 74 Page(s) In Document Exempt

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE
121 Mount Olive Drive
Rexdale, Ontario, Canada

Plaintiff

v. Civil Action No. 15952

JUHI RAUS
5108 43rd Avenue
Hyattsville, Maryland

Defendant

ANSWER

First Defense

The complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendant admits the jurisdiction of the court. He admits that the plaintiff is a resident of Ontario, Canada, and that the defendant is a citizen of the United States and a resident of Prince Georges County, Maryland. He also admits that he is and was in 1963 the National Commander of the Legion of Estonian Liberation, Inc., and that he is a person of responsibility and integrity whose word is likely to be credited among officers of the Legion and its various branches, excepting, however, Aleksander Allikas, Elmar Keerd, and August Kuklane.

Defendant further admits that the plaintiff has on several occasions come to the United States in the guise of a lecturer and exhibited a certain motion picture titled in english, "Creators of Legend," and, during the course of such lecture tours, has raised sums of money allegedly for the cause of Estonian liberation. The defendant likewise admits that the lectures and the motion picture purport to describe the plaintiff's experiences as a partisan freedom fighter in Soviet occupied Estonia.

3. Defendant further admits that on November 9, 1963, at a special meeting in the City of New York of the Board of the Legion of Estonian Liberation and the Board of the Legion's New York City branch, in the presence of other board members, he did say that he was in possession of responsible information received by him from an official agency of the United States Government to the effect that the plaintiff was a Soviet agent or collaborator and on that account should not receive the cooperation of the Legion and its branches during the plaintiff's tours of the United States. (COMPLAINT ¶ 5)

4. The defendant also admits having spoken to one August Kuklane, an officer of the Baltimore branch of the Legion of Estonian Liberation, in substantially the same terms as heretofore stated and for substantially the same reasons on an occasion earlier than those specified in paragraphs 6 and 7 of the complaint. However, he denies making the statements attributed to him as specified in those paragraphs.

2. As to each and every other material allegation of the complaint the defendant either denies them or is without knowledge or information sufficient to form a belief with respect thereto.

Third Defense

The utterances made by the defendant that he had received responsible information from an official agency of the United States Government to the effect that the plaintiff was a Soviet agent or collaborator were true.

Fourth Defense

The defendant made statements concerning the plaintiff only upon privileged occasions to persons privileged to receive them, and each such statement was made without express or actual malice in furtherance of the defendant's legitimate duties, responsibilities and offices.

HOGAN & HARTSON
COLORADO BUILDING
WASHINGTON 5, D. C.

Fifth Defense

The defendant in speaking of the plaintiff as he did was exercising his right of free speech guaranteed by the First Amendment to the Constitution of the United States.

Sixth Defense

The maintenance of the present action by the plaintiff is contrary to the interest and public policy of the United States.

Seventh Defense

The defendant was privileged to speak of the plaintiff as he did, since the defendant was acting as an appropriate officer of the Estonian liberation movement.

Eighth Defense

The action, based upon a communication to August Kuklane, is barred by limitations.

Paul R. Connolly, Esq.

E. Barrett Prettyman, Jr., Esq.

of counsel:
Hogan & Hartson
Washington, D. C.

E. Barrett Prettyman, Jr., Esq.
800 Colorado Building
Washington 5, D. C.

Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing answer was mailed, postage prepaid, this 3rd day of January 1965 to Ernest C. Raskauskas, Esquire, 1418 Ray Road, Hyattsville, Maryland, Attorney for Plaintiff.

Paul R. Connolly, Esq.
Attorney for Defendant

HOGAN & HARTSON
COLORADO BUILDING
WASHINGTON 5, D. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	)	
Plaintiff,	)	
v.	)	Civil Action No. 15952
JURI RAUS	)	
Defendant.	)	
	)	

NOTICE TO TAKE ORAL DEPOSITION

Please take notice that the defendant will take the oral deposition of the plaintiff, Eerik Heine, commencing at 10:00 A.M., Tuesday, February 2d, 1965, in the offices of Hogan & Hartson, 800 Colorado Building, Washington 5, D.C., pursuant to Federal Rules of Civil Procedure, before George M. Poe, Notary Public, or some other person authorized to administer an oath.

Paul R. Connolly

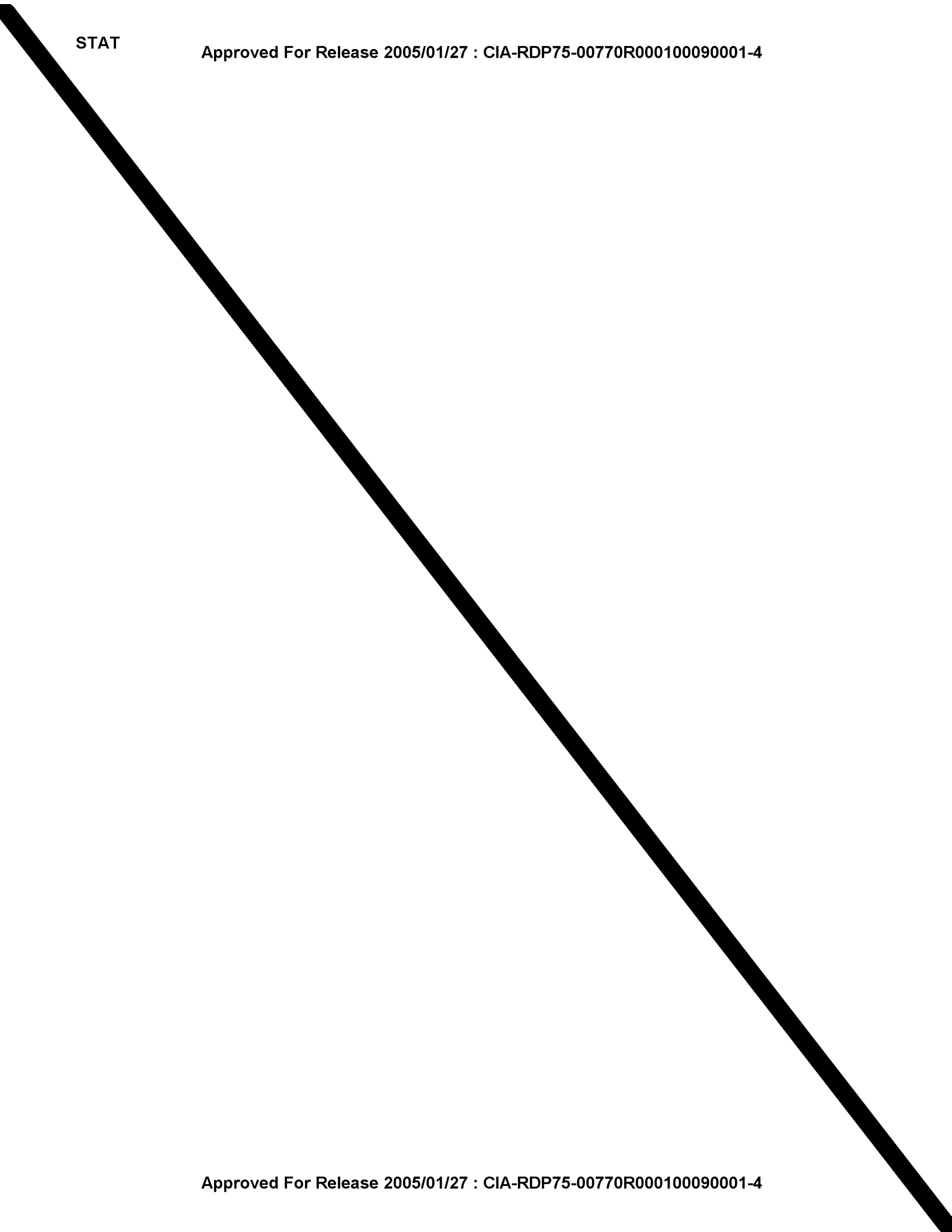
E. Barrett Prettyman, Jr.
800 Colorado Building
Washington 5, D. C.
Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing notice was mailed, postage prepaid, this 3rd day of January 1965 to Ernest C. Raskauskas, Esquire, 1418 Ray Road, Hyattsville, Maryland, Attorney for Plaintiff.

Paul R. Connolly

HOGAN & HARTSON
COLORADO BUILDING
WASHINGTON 5, D. C.



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D. C. Form No. 45a Rev. (6-49)

United States District Court

FOR THE

DISTRICT OF MARYLAND

NOV 6 4 12 PM '64

CIVIL ACTION FILE No. 15952

ERIK HEINE

Plaintiff

v.

JURI RAUS
5103 43rd Avenue
Hyattsville, Maryland
United States of America

Defendant

SUMMONS

SUMMONS IN CIVIL ACTION

To the above named Defendant :

You are hereby summoned and required to serve upon Ernest C. Raskauskas, Esquire

plaintiff's attorney, whose address is 1418 Ray Road
Hyattsville, Maryland

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILFRED W. BUTSCHKY
Clerk of Court.

CERTIFIED COPY
TEST:

GARY SAPPERSTEIN
Deputy Clerk.

WILFRED W. BUTSCHKY
Clerk

Date: November 6, 1964

By Gary Sapperstein
Deputy Clerk

[Seal of Court]

NOTE: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERIK HEINE
121 Mount Olive Drive
Rexdale, Ontario
Canada

Plaintiff

vs.

Civil Action No. 15952

JURI RAUS
5103 43rd Avenue
Hyattsville, Maryland
United States of America

Defendant

COMPLAINT IN DAMAGES FOR SLANDER

Jurisdiction of this cause is founded under the United States Code, Title 28, Section 1332, Paragraph (a), and subsection (a), (2). The matter in controversy herein exceeds the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and cost, and is between a citizen and resident of the Dominion of Canada and a citizen and resident of the State of Maryland and of the United States.

1. The plaintiff, Berik Heine, is a citizen of Canada and a resident of the town of Rexdale, Province of Ontario, Dominion of Canada.

2. The defendant, Juri Raus, is a citizen of the United States and of the State of Maryland, and is a resident of the Town of Hyattsville, County of Prince George's, State of Maryland, residing at 5103 43rd Avenue.

3. The plaintiff is a good, true, honest and virtuous citizen of said town, province, and dominion, and such, during his entire life, has demeaned and behaved himself, and during his entire life has remained free and unsuspected of Communism, being a Communist or a Communist Agent, and being a member of the Communist Party of the United States, Canada, or any other country, or any other organization whose object or purpose is to overthrow the Federal and State Governments of the United States and of other countries, by force and violence, and any other such crimes. The

plaintiff was esteemed and reputed as a person of good name, credi and reputation, by reason of which he gained the respect, good wil and esteem of all of his neighbors and divers other good people of the Dominion of Canada and of the United States of America.

4. The plaintiff for a long time past and before the speaking and uttering of the false and defamatory words hereinafter mentioned, followed and carried on the avocation of a lecturer and exhibitor of a certain motion picture titled "Creators of Legend", by means of which he partially earned his livelihood and acquired certain sums of money. Said lectures of the plaintiff were based on his experiences as a prisoner in Russian prison camps and on his personal Guerilla fighter activities in Occupied Estonia. Said motion picture portrays in detail the brutalities committe by the Communist in Occupied Estonia. Said lectures and said motion picture which was produced by the plaintiff, were well received and attended by thousands and thousands of persons of Estonian extraction, and others, because the plaintiff is an Estonian by birth, and said lectures and motion picture were based on his personal experiences and his known vigorous anti-communist activities.

5. The defendant, Juri Raus, contriving to deprive plaintiff of his good name, credit and reputation and to bring him into disrepute among his neighbors, and amongst people of Estonian extraction both in the United States and in Canada, and further to bring him into disrepute in the various organizations in which plaintiff is a member, did on November 9, 1963, SATURDAY in New York, at a special meeting of the Board of the Legion of Estonian Liberation in New York, in the presence and hearing of one Aleksandar Allikas and one Elmar Keerd and other persons, maliciously speak and publish the following defamatory words: "Eerik Heine is a Communist" and "Eerik Heine is a KGB Agent", and that by said words "KGB Agent" defendant meant, and was understood by said persons to whom said

words were communicated to mean, that plaintiff was a Communist Secret Agent, and was unlawfully, willfully, and feloniously conducting illegal activities in the United States and in Canada. By said defamatory statements, defendant Juri Raus, meant and intended to charge plaintiff with the crimes of being a party to an International Revolutionary Communist Conspiracy which is committed to overthrow by force and violence the Governments of Canada, of the United States and of the several states, including those of the States of New York and of Maryland, and for being a member of the Communist Party whose object and purpose is to overthrow Governments of Canada and the United States by force and violence, and for knowingly participating in the revolutionary activities of the Communist Party, knowing the revolutionary object or purpose thereof.

6. On or about July 4 (Holiday), 1964, at an Estonian gathering at Laurel Acres, Pasadena, Maryland, the defendant, Juri Raus, repeated, uttered and published the said malicious, false, slanderous and defamatory statements hereinabove alleged, and by said words defendant meant, and was understood by said August Kuklane to whom said words were communicated to mean, that plaintiff was a Communist and a Communist Agent, and that he was unlawfully, willfully, and feloniously engaged in illegal and revolutionary activities, all designed to overthrow the Governments of the United States and Canada by force and violence.

7. On or about September 4 (FRIDAY), 1964, at an Estonian gathering at Estonian House, 1932 Belair Road, Baltimore, Maryland, at a reception in honor of Estonian Colonel Alfons Rebane, the defendant Juri Raus, repeated, uttered and published the said malicious, false slanderous and defamatory statements hereinabove alleged, and by said words defendant meant, and was understood by said August Kuklane to whom said words were communicated to mean, that plaintiff was a Communist and a Communist Agent, and that he was unlawfully, willfully, and feloniously engaged in illegal and revolutionary activities, all designed to overthrow the Governments

of the United States and Canada by force and violence.

9. The plaintiff, Eerik Heine, is nowise guilty of said crimes so falsely and maliciously charged by defendant, but said words uttered by defendant were and are untrue and were known by the defendant to be untrue when uttered and published, on all three occasions hereinabove alleged.

10. The defendant, Juri Raus, is a person of apparent responsibility whose position in life and whose position in various Estonian organizations is calculated to give credit to the utterances and charges aforesaid.

10. By reason of the aforesaid defamatory and slanderous utterances of the defendant, plaintiff has not only been greatly injured and damaged in his good name, fame, credit, and reputation, but also has been brought into general scandal, disgrace and disrepute amongst members of the Estonian Community both in the United States and in Canada, and amongst others, who, ever since the speaking and uttering of said false, scandalous, and defamatory words and criminal allegations, has made plaintiff suspect of having been guilty of said crimes.

11. Plaintiff has been injured in his reputation and good standing in the community where in he lives, and amongst people of the Estonian community both in the United States and in Canada in the amount of Ten Thousand Dollars ($10,000.00).

12. Plaintiff alleges that the utterances and publications of the defendant hereinabove alleged were slanderous and defamatory per se, and that said utterances and publications thereof were willfull, malicious, false, and designed to injure and damage plaintiff, and that plaintiff is entitled to recover punitive and exemplary damages in the sum of One Hundred Thousand Dollars ($100,000.00).

WHEREFORE, plaintiff, Eerik Heine, demands judgment against defendant, Juri Raus, in the sum of Ten Thousand Dollars ($10,000.00) as general damages.

WHEREFORE, plaintiff, Eerik Heine, demands judgment against

the defendant, Juri Raus, in the sum of One Hundred Thousand Dollars ($100,000.00), as exemplary and punitive damages, together with interest and the cost of this suit.

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PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE

Ernest C. Raskauskas
Attorney for the Plaintiff